78-1356

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-

MACOMB CONCRETE CORPORATION,
a Michigan corporation,
Petitioner,

v.

EARL DUBEY & SONS, INC.,
a Michigan Corporation and
SENTRY INSURANCE COMPANY,
a foreign corporation,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

Robert P. Dank, on behalf of Petitioner prays that a writ of certiorari issue to review the judgment of The Supreme Court of the State of Michigan entered in the above case on December 7, 1978, being State Supreme Court No. 61401.

OPINIONS BELOW

The decision of the State of Michigan Supreme Court on rehearing has not yet been published. The original denial of application for leave to appeal is published at 403 Mich. 811 (1978). The decision of the Michigan Court of Appeals to deny rehearing is not published. The original opinion of the Michigan Court of Appeals is published at 81 Mich. App. 662, 266 N.W. 2d 152 (1978).

JURISDICTION

This Civil Action was commenced in The Circuit Court for the County of Alpena, State of Michigan on September 13, 1974. The Complaint, having four separate counts, sought rescission of a contract and money damages for alleged fraud, mistake, impossibility of performance and breach of contract.

Each count of the Complaint, except the count in breach of contract for money damages was dismissed at the conclusion of trial by the Trial Court. No appeal was taken from this action of the Trial Court.

The count of the Complaint in assumpsit and a counter-complaint for money damages for breach of contract by Petitioner against Respondents were presented to the jury. The jury was instructed to find for Petitioner, only if it did not find for Respondent on its original complaint in assumpsit.

The jury returned a verdict for Respondent Earl Dubey & Sons, Inc. in the amount of Three Hundred Thirteen Thousand, Six Hundred Sixty-One and 56/100 ($313,661.56) Dollars.

On appeal to the Michigan Court of Appeals, the Court of Appeals overturned the trial court's ruling as to the legal duty breached by Petitioner, but upheld the verdict against Petitioner on a theory of liability never pleaded or raised during trial.

The Michigan Court of Appeals denied an application for rehearing that raised due process questions. The Michigan Supreme Court denied leave to appeal and further denied a motion for rehearing, both of which raised the same constitutional questions about the Court of Appeals' action.

Jurisdiction is conferred on this court pursuant to 28 U.S.C. §1257 (1970), this being a petition to review the action of the highest court of the State of Michigan which deprives petitioner of property, privileges and titles held and protected by the United States Constitution.

QUESTION PRESENTED FOR REVIEW

HAS A DUE PROCESS HEARING BEEN DENIED WHERE A STATE COURT OF APPEALS, DURING ITS APPELLATE PROCESS, SUMMARILY IMPOSED A VERDICT UPON A THEORY OF RECOVERY NEVER PLEADED, RAISED OR ARGUED AT TRIAL, AND FROM WHICH NO APPEAL WAS AFFORDED?

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

Petitioner is a concrete paving contractor. Respondent is a contractor engaged in the mining and production of sand and gravel products.

Under a contract between Petitioner and Respondent that was dated January 31, 1974, and amended May 31, 1974 and June 1, 1974, Respondent was unable to timely produce sand materials for Petitioner, and incurred serious financial difficulty in the process. A new contract was executed on July 17, 1974 which extended Respondent's time for producing the required materials and gave Petitioner an option to advance monies, not yet due to Respondent, to Respondent's creditors, as a possible means of completing the sand production.

Advances were not made by Petitioner under the contract and a secured creditor of Respondent repossessed Respondent's sand and gravel production plant nine days later, on July 26, 1974.

The sand production site was leased by Petitioner and sub-let to Respondent. Three days after the plant repossession, July 29, 1974, Petitioner notified Respondent by telegram of its intent to retake possession of the site.

Respondent commenced this action on that contract in a State of Michigan Circuit Court with a Complaint that alleged, as the sole theory of recovery, (three other counts were dismissed at the end of the trial based upon fraud, mistake and impossibility) that Petitioner breached a duty to Respondent to pay its creditors. Money damages were sought (Appendix I).

Under appropriate State Court Rules, Petitioner filed a Motion for Summary Judgment on this count with its first responsive pleading, claiming that the contract did not impose a legal duty to advance monies, but merely gave Petitioner an option to do so (Appendix II).

Respondent amended its Complaint prior to trial, but did not alter its theory of recovery that was based upon this claimed breach of duty to advance sums to creditors. Petitioner admitted that it did not advance sums to Respondent's creditors.

During the trial and at the conclusion of trial, Petitioner made motions, appropriate under State Court Rules, for Directed Verdict and Judgment Notwithstanding the Verdict, respectively. These motions were also based upon the contention that the contract did not impose a legal duty upon Petitioner to advance sums (Appendix III and Appendix IV).

The Trial Court denied the Motions for Summary and Directed Verdict and for Judgment Notwithstanding the Verdict, upon the mistaken belief that an optional provision for making advances was against public policy.

The Trial pleadings, the opening statement of counsel at trial, the transcript of trial proceedings and the final argument of counsel are void of allegations about any theory of recovery on this contract, other than the claimed breach of duty to advance sums to creditors of Respondent. The trier of fact faced only the issue of whether Petitioner breached the contract by not paying creditors of Respondent, an issue conceded by Petitioner.

The jury verdict was rendered April 7, 1976, in the sum of Three Hundred Thirteen Thousand Six Hundred Sixty-One and 56/100 ($313,661.56) Dollars.

Petitioner appealed to the Michigan Court of Appeals, where the procedure adopted by the Michigan Judiciary allowed for: (a) filing a brief by Petitioner; (b) filing an answer brief by Respondent; and (c) oral argument.

In its brief filed in answer to Petitioner's brief, Respondent raised for the first time (seventeen (17) months after the jury verdict) a new theory of recovery. Under the new theory of recovery it was claimed that Petitioner breached a duty to extend time for Respondent's performance by retaking the site after the plant was repossessed (Appendix V).

In oral argument* before the Court of Appeals, Petitioner explained that the duty-to-extend-time theory had not been before the trial court and that no hearing had been held on it.

In its opinion, the Court of Appeals ruled that the trial court was in error and Petitioner was correct at trial, in that, there was no legal duty on Petitioner under the contract to advance sums to Respondent's creditors (Appendix VI, p. 47).

The Court of Appeals, however, then went on to further hold that the judgment was sustainable on the newly-raised theory of recovery, ruling that the duty to extend time was breached by Petitioner when it sent the telegram to recover the site (Appendix VI, p. 48).

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* Transcripts of this oral argument are not made available by the Michigan Court of Appeals.

On Application for Rehearing before the Michigan Court of Appeals, Petitioner again pointed out that the new theory of recovery was never raised at trial. Petitioner argued prejudicial surprise (Appendix VII, p. 57) and that the trial record had no facts to support this new theory (Appendix VII, p. 60). Petitioner further argued that it had never been confronted by and had never defended against this issue at trial and that allowing a judgment to stand on this basis was a denial of due process (Appendix VII, p. 60). An affidavit was filed showing that evidence could have been produced at trial if the issue had been raised (Appendix VIII).

The Court of Appeals denied the Application for Rehearing (Appendix IX). Application for Leave to Appeal to the Michigan Supreme Court was then timely filed by Petitioner, there being no right of appeal from the Court of Appeals decision in Michigan Jurisprudence (Appendix X).

The Application for Leave to Appeal to the Supreme Court alleged that the decision of the Court of Appeals resulted in a denial of due process guaranteed by the State and United States Constitutions (Appendix XI). In its supporting brief, Petitioner explained that it had never been confronted at trial with the issue of extension of time, had no opportunity to defend against this theory and that it introduced no evidence in its defense, while in fact a defense did exist and could have been pleaded and advanced at trial. Petitioner argued this defense was obvious, from the existing record which showed that it was always the position of Respondent at trial that any extension of time was futile (because of the prior plant repossession by creditors of Respondent). Under this position, Petitioner argued it was legally excused from allowing more time for Respondent's performance (Appendix XII).

The Supreme Court of Michigan denied the Application for Leave to Appeal (Appendix XIII) and execution upon the Judgment was commenced in August, 1978. A Motion for Rehearing was then filed with the State Supreme Court. The only issue raised in the Brief in Support of Motion for that Rehearing was the denial of due process under the State and United States Constitutions, in which all of the foregoing arguments were made (Appendix XIV). The Motion for Rehearing was denied by the Supreme Court on December 7, 1978 (Appendix XV).

REASONS FOR GRANTING THE WRIT

The exercise of Writs of Execution in satisfaction of the State Court judgment have deprived and are continuing to deprive Petitioner of its property.

This action by the state court is state action against which the Fourteenth Amendment of the United States Constitution affords protection, *Kreshik v. St. Nicholas Cathedral of Russian Orthodox Church*, 363 U.S. 190 (1960), and confers jurisdiction upon this Court under 28 U.S.C. §1257 (1970).

The judgment upon which these executions are taking place was issued by the Michigan Court of Appeals based upon a legal theory of recovery to which Petitioner had no hearing, as required by due process, to-wit: (a) the settled practice forum was varied, during proceedings, without notice to Petitioner; (b) no pleadings giving notice of the claim were served upon Petitioner; (c) no opportunity to establish an existing defense or introduce evidence was afforded Petitioner;

(d) no right to confront and cross-examine witnesses was afforded to Petitioner; (e) findings supporting the verdict were arbitrary and baseless; (f) the judgment entered exceeded the claim asserted in pleadings; and (g) no right to appeal the arbitrary action of the State Court of Appeals was afforded.

This court has often stated that a due process procedure is provided if a state citizen is afforded reasonable notice and a reasonable opportunity to be heard and present his claim or defense (regard being had to the nature of the proceeding and character of the rights affected); *Dohany v. Rogers*, 281 U.S. 362, 369 (1930); and *Reetz v. Michigan*, 188 U.S. 563, 566 (1903). Nevertheless, this broad concept has been given specific and practical dimension on a case-by-case basis.

The fundamental concept embraced by each of these definitive decisions is that justice condemns only after a *hearing*, *Hovey v. Elliott*, 167 U.S. 215 (1897).

What constitutes a *hearing* was explained in *Shields v. Utah-Idaho Central R. R. Co.*, 305 U.S. 177, 182 (1938):

> The requirement of a "hearing" has obvious reference "to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts." The "hearing" is "the hearing of evidence and argument." Morgan v. United States 298 U.S. 468, 480.

Such a hearing, it is held, must be a *full* hearing, which is defined as one that affords ample opportunity to make a showing, by evidence and argument, fairly adequate to establish the impropriety of the step to be taken, from the standpoint of justice and law, *Akron, Canton and Youngstown Ry. Co. v. United States*, 261 U.S. 605, 614 (1923).

At all times during the state court activities complained of, the Michigan Court system had an established procedure for processing civil claims. Article 6 of the Michigan State Constitution of 1963 establishes the levels of courts and proscribes the method of operating the judicial branch of government. The State Supreme Court adopted in 1963 and repeatedly amended General Court Rules, pursuant to mandate of the state constitution. Hearings for civil cases involving a controversy of more than Ten Thousand ($10,000) Dollars are called *trials* and proceed before the Circuit Courts, according to rules contained in Chapter 50 of the General Court Rules. The Supreme Court has adopted Rules of Evidence governing proceedings before the circuit courts in trial (*See, Perin v. Peuler*, 373 Mich 531, 130 N.W. 2d 4 (1964)).

Appeals of right are afforded from the circuit courts of Michigan to the Michigan Court of Appeals; 1963 *Michigan General Court Rules*, Chapter 80. This chapter provides for an Appellant to file a brief within 60 days of receipt of a trial transcript; Appellee to file a response within 40 days of the filing by the Appellant; and, the Court to set a calendar for oral argument, if argument is requested. A motion for rehearing is allowed if filed within 20 days of the filing of the Court of Appeals' Opinion. Answer may be filed thereto within 10 days.

Appeals to the Supreme Court of Michigan are not a matter of right, but proceed by leave of court only, 1963 *Michigan General Court Rules*, Chapter 80.

The instant case was commenced by Respondent before a Michigan Circuit Court pursuant to applicable court rules. Four counts were contained in the

complaint in which Respondent sought to escape legal liability for failure to complete performance of the contracts, and sought money damages against Petitioner on various theories. All but one of those theories were dismissed by the trial judge at the conclusion of the trial (no appeal was taken by Respondent from this action of the Trial Court).

The only count of the complaint upon which the trier of fact was permitted to make its findings is set forth in full in Appendix I. The theory of recovery expressed there was that the contract of July 17, 1974 imposed a duty upon Petitioner to make advances to Respondent's creditors and that the duty was breached when no payments were made. Petitioner met this contention, of course, with an admission that payments were not made. In spite of timely motions filed by Petitioner for legal rulings that no duty was imposed under the contract, the Trial Court mistakenly allowed the jury to find a verdict, which it did in favor of Respondent.

On appeal to the Michigan Court of Appeals, and after Petitioner, as Appellant, filed its brief, Respondent, in its answer brief raised a new theory of recovery. It claimed that Petitioner had failed to allow Respondent time in which to complete the contract.

In oral argument before the Court of Appeals, Petitioner pointed out that this theory had not been raised at trial and asked the Court to disregard such new issues according to the established procedure pronounced in *Falk v. Civil Service Commission of Macomb County*, 57 Mich. App. 134, 225 N.W. 2d 713 (1974) which has since been reaffirmed in *Oakland County v. Detroit*, 81 Mich. App. 308, 265 N.W. 2d 130 (1978).

The Michigan Court of Appeals ruled that there was no legal duty upon Petitioner to advance sums (which was the only legal duty raised in trial) but then, without explanation, varied its established procedure and upheld the lower court verdict upon the theory raised for the first time in the answer brief before the Court of Appeals.

In so doing, the Court of Appeals did great violence to the settled-practice of the state. This nunc pro tunc finding was completely arbitrary and baseless, without evidence, and was in violation of the holding of *Interstate Commerce Commission v. Louisville and Nashville R. R. Co.*, 227 U.S. 431, 433 (1913).

Petitioner in its motion for Rehearing before the Court of Appeals pointed out that the new theory had not been raised in trial. Two quotes from Respondent's final argument to the jury were cited, to demonstrate that the only theory of recovery advanced at trial was the theory that Petitioner failed to pay creditors. Those two (2) quotes from pages 57-58 of Appendix VII are as follows:

> There is not any doubt that there was an agreement, there can't be, and there's not any doubt that Westinghouse was supposed to be paid. Now, if Westinghouse had been paid, the plant wouldn't have been taken back, and we would have a different ballgame, but the fact remains that that is a breach of contract. I'll grant you that up until the 17th of July, they had been working on a problem. Dubey had not provided them with the 234,000 tons of material. I don't deny that, but they signed these agreements on the 17th to try to solve that problem. (Trial Transcript, April 2, 1976, p. 48)

and again at page 49:

> Now, what happens after the agreement is breached? Well, there isn't any question that it's breached in my opinion because they didn't pay Westinghouse, and both Chuck King and Howard Martin have already told you that Westinghouse was to be paid. There's no doubt about that now, I think. So, when they weren't paid, that was the worst possible thing, the worst way in which Macomb could have breached this contract if they were going to breach it, as apparently they were as of the 19th, two days after they signed it. The worst way they could breach it is not to pay Westinghouse because there goes the plant.

The Court of Appeals denied the motion for rehearing, and thus Petitioner's right to have pleadings, introduce evidence and have findings on the new theory, as prescribed by *Baltimore & Ohio R. R. Co. v. United States*, 298 U.S. 349, 369 (1936), was ignored.

The judgment, as now framed, is not contained within the claim asserted against Petioner, and as such violates the tenets of *Standard Oil Co. of Indiana v. Missouri*, 224 U.S. 760, 767 (1911), which held:

> 2. The Federal question is whether, in that court, with such jurisdiction, the defendants were denied due process of law. Under the 14th Amendment they were entitled to notice and an opportunity to be heard. That necessarily required that the notice and the hearing should correspond, and that the relief granted should be appropriate to that which had been heard and determined on such notice. For even if a court

> has original general jurisdiction criminal and civil, at law and in equity, it cannot enter a judgment which is beyond the claim asserted, or which in its essential character, is not responsive to the cause of action on which the proceeding was based.

By the procedure thus summarily adopted by the State Court of Appeals, Petitioner was denied its right to confront and cross-examine witnesses on the new critical issue of legal duty as required by *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959), a Sixth Amendment case that extends to conduct required of a State (see cases cited therein).

There was no notice to Petitioner that the State Court of Appeals intended to vary its rule that only issues raised in the trial court could be raised on appeal, and the action of the Court of Appeals surprised Petitioner. In denying the application for rehearing, no reason for this variance was cited by that court and petitioner was denied its right to a hearing according to the settled practice as required by *Hovey v. Elliott, supra*.

Following the rehearing application before the Court of Appeals, Petitioner was without recourse to remedy the error of that court. The appeal from that court was by leave only, and although the federal issue was prominently advanced in the petitions for leave, it was denied. Lack of a right of appeal from such an arbitrary hearing has also been held to be a violation of due process, *Lindsey v. Normet*, 405 U.S. 56, 77 (1972).

It is important to point out that a substantial difference attaches to the evidence required to meet the issue of failure to pay creditors than to meet the issue

of failure to sit and wait two and one-half additional months for Respondent to complete the contract. This is especially true under the uncontroverted facts raised and argued *by Respondent* at trial:

A. On July 17, 1974, the contract was signed.

B. On July 26, 1974, Westinghouse Credit Corporation repossessed Respondent's sand producing plant, and according to Respondent's final jury argument, Respondent's ability to produce sand was then and there "put to an end. No doubt about it."

C. On July 29, 1974, Petitioner telegrammed Respondent of its intent to re-take possession of the gravel pit, the fact of which the State Court of Appeals arbitrarily ruled was the act that breached a duty to extend more time for production.

In defense of this issue, the impossibility of Respondent's ability to perform is alone a defense to the cause of action under Michigan law, *Adams v. E. M. Burke Homes, Inc.*, 14 Mich. App. 578, 590, 166 N.W. 2d 34 (1968). However, more significant to the case was the inability of Petitioner, under the State Court of Appeals' action herein, to develop a defense at trial. Petitioner was totally unable to adduce testimony and to bring new facts before the trier, as to such matters as: (a) the length of time needed for anyone to produce the contract; (b) the ability of Respondent to acquire new equipment to perform; and (c) the financial ability of Respondent to complete the agreement, all of which bear significantly upon the newly raised issue.

What could have been done at trial must be contrasted with the posture actually adopted by Petitioner in admitting that it paid no sums but denying a duty to do so and the posture of Respondent in alleging only that non-payment of creditors caused Respondent to cease operations on July 26, 1974. It can readily be seen under these circumstances that shifting the case from one theory to the other was prejudicial to Petitioner.

Had Petitioner been clairvoyant at trial and attempted to extend the four and one-half week trial by introducing such evidence in anticipation of the action by the state court of appeals, it would have met with the state common law bar limiting a party in trial to issues framed in pleadings, in the material it may offer into evidence; *Hartley v. A. I. Rodd Lumber Co.*, 282 Mich. 652, 276 N.W. 712 (1937); *Ewing v. Heathcott*, 348 Mich. 250, 255, 83 N.W. 2d 210 (1957); and *Berger v. Travelers Insurance Co.*, 2 Mich. App. 269, 280, 139 N.W. 2d 749 (1966), aff'd, 379 Mich. 51 (1967).

The unprecedented and unexplained change of procedure by the State Court of Appeals, together with its summary imposition of judgment upon a new theory of recovery deprived Petitioner of its rights to:

a. notice of the basis of the claim against it,

b. develop and plead a defense,

c. confront and cross-examine on the critical issue of the case,

d. introduce evidence on its own behalf,

e. a practice conforming to the settled practice of the state,

f. findings based upon evidence obtained in a full hearing,

g. a judgment within the claim asserted against it, and

h. an appeal from a purely arbitrary fact-finding proceeding.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Dated: February 23, 1978

APPENDIX I

COMPLAINT

(State of Michigan
In the Circuit Court for the County of Alpena)

(Earl Dubey & Sons, Inc., a Michigan corporation, Plaintiff, v Macomb Concrete Corporation, a Michigan corporation, Defendant. File No. 74-002368-CK)

COUNT I

NOW COMES the Plaintiff by its attorneys, Freihofer, Cook, Hecht, Oosterhouse & DeBoer, P.C., and for Count I of its Complaint against the Defendant alleges as follows:

1. Plaintiff is a Michigan corporation with its principal place of business in Alpena, Michigan.

2. The Defendant, Macomb Concrete Corporation, is a Michigan corporation, with its principal place of business in Fraser, Michigan.

3. In December of 1973, the Defendant contacted the Plaintiff and inquired as to the Plaintiff's interest in entering into an agreement for the production of various materials, which may generally be described as "gravel materials", in conjunction with the Defendant's contract with the City of Houston for the resurfacing of airport runways.

4. On or about January 31, 1974, the Plaintiff entered into an Agreement with the Defendant, a copy of which is attached hereto as Exhibit A.

5. Said Agreement between the parties specified that the Plaintiff was to mine and process the materials called for under Exhibit A in accordance with the terms of a lease dated January 18, 1974, between Cle-Tex Materials, Inc., and the Defendant.

6. At no time did the Defendant request the Plaintiff to secure a site for the production of the materials or to evaluate the site which the Defendant had secured and leased on January 18, 1974; but, to the contrary, the Defendant instructed the Plaintiff precisely what area the Plaintiff was to mine in order to obtain the materials required under Exhibit A.

7. Following the execution of Exhibit A, the Plaintiff commenced setting up and preparing for the processing of materials required thereunder.

8. Subsequent to the execution of Exhibit A, the Plaintiff diligently attempted to perform his agreement with the Defendant, but Plaintiff has been unable to provide all of the specification materials to the Defendant for the reason that the same cannot be obtained from the natural material present, within the proscriptions of the Cle-Tex—Macomb lease of January 18, 1974.

9. The Defendant represented to the Plaintiff that the Plaintiff could obtain specification gravel materials from the site upon which Defendant had secured a lease from the Cle-Tex Corporation, i.e., the January 18, 1974 lease between Cle-Tex and Macomb referred to above.

10. On Thursday, August 1, 1974, the Plaintiff learned, for the first time, that the Defendant knew,

prior to the execution of Exhibit A, that the raw materials at the leased site were geologically deficient in their existing ratios in certain grades of required materials, so as to make it impossible to obtain gravel materials according to the specifications set forth in Exhibit A.

11. Notwithstanding the Defendant's prior knowledge that the site upon which it had obtained a lease and upon which it directed the Plaintiff to mine and process gravel materials was geologically deficient, the Defendant concealed this information from the Plaintiff, and represented to the Plaintiff that said site was suitable.

12. In attempting to provide Defendant with the materials required under Exhibit A, the Plaintiff has expended approximately $496,950.00.

13. The Defendant intentionally withheld and concealed from the Plaintiff, material facts known to it, prior to the execution of Exhibit A, as to the unsuitability of the property which it had leased and upon which it directed the Plaintiff to operate the gravel materials facility; and further, said omission and concealment of such material facts constitutes fraud as against this Plaintiff.

14. The Defendant, in failing to inform the Plaintiff of the known unsuitability of the leased gravel site, committed fraud and misrepresentation as to material facts to the Plaintiff, upon which Plaintiff relied to its detriment.

* * * *

COUNT III

NOW COMES the Plaintiff by its attorneys, Freihofer, Cook, Hecht, Oosterhouse & DeBoer, P.C., and for Count III of its Complaint against the Defendant says as follows:

1. Plaintiff hereby incorporates by reference, as if fully rewritten herein, paragraphs 1-14 of Count I.

2. The Defendant repeatedly promised the Plaintiff, Earl Dubey & Sons, Inc., that it would advance said Plaintiff such further sums as necessary, up to the total contract price of $543,000.00 to enable said Plaintiff to complete performance of said contract, and the parties entered into an extension agreement for said purpose dated July 17, 1974, including promissory note, security agreement, and guaranty agreement and UCC forms, all of which documentation are in the possession of the Defendant, Macomb Concrete Corporation.

3. The Defendants agreed to advance the Plaintiff certain sums, up to the contract price of $543,000.00, for the purchase of extraordinary equipment so as to enable Plaintiff to further refine the available raw materials, and thereby attempt to obtain the proper ratio of gravel materials so long as Plaintiff's proposed expenses were approved by the Defendant's consultant, Finis White.

4. Included in the agreements of the Defendant and representations made by it to the Plaintiff was the agreement to pay certain sums to Westinghouse Credit Corporation to which Plaintiff had become indebted for the purchase of equipment for use in Texas.

5. Contrary to its agreements and representations to the Plaintiff, the Defendant did not advance sums to the Plaintiff, which Plaintiff deemed necessary for the acquisition of additional equipment, and it did not make payment to Westinghouse Credit Corporation, as it had agreed to do.

6. Defendant's failure and refusal to advance the sums as promised to the Plaintiff constitutes a breach of the agreements and amended agreements between the parties hereto of such a material and substantial extent that Plaintiff is excused from further performance thereunder, the Plaintiff is entitled to damages for Defendant's breach of contract.

WHEREFORE, Plaintiff prays for judgment against the Defendant declaring the obligations of the Plaintiff under the agreements between the parties terminated, and for a money judgment against the Defendant in the amount of $318,358.45, as compensatory damages, and an Order declaring all guarantors and sureties of Plaintiff discharged and released from any liability whatsoever.

* * * *

FREIHOFER, COOK, HECHT,
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By: /s/ Peter R. Tolley (P-21492)

Dated: August 14, 1974

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By: /s/ Douglas K. Wenzel

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APPENDIX II

MOTION FOR SUMMARY JUDGMENT

(State of Michigan
In the Circuit Court for the County of Alpena)

NOW COMES the Defendant, MACOMB CONCRETE CORPORATION, and moves this Honorable Court for Summary Judgment against the Plaintiff upon allegations set forth in Count III of the Plaintiff's Complaint, and for its Motion says:

1. There is no legal duty on the part of the Defendant to perform as alleged in Count III.

2. That the legal duty of the Defendant is described in the contract labeled Exhibit A attached to the Plaintiff's Complaint and that under the terms of said Contract there is no obligation on the part of the Defendant to perform as set forth in the allegations contained in Count III.

3. That for the reasons above stated the Plaintiff has failed to state a claim upon which relief can be granted.

4. The Defendant is entitled to Summary Judgment as prescribed by Court Rule 117.2(1).

WHEREFORE, Defendant prays that a Motion for Summary Judgment in favor of the Defendant and against the Plaintiff as to the allegations set forth in Count III of the Plaintiff's Complaint be granted and that Defendant be awarded costs and attorney fees so wrongfully sustained.

DANK, PETERSON AND HAY, P.C.
ROBERT P. DANK (P12487)
Attorneys for Defendant
44 First Street
Mount Clemens, Michigan 48043
Telephone: 465-4561

APPENDIX III

TRANSCRIPT OF PROCEEDINGS

(State of Michigan
In the Circuit Court for the County of Macomb)

PROCEEDINGS had before the HONORABLE ROBERT J. CHRZANOWSKI, (P-11875), Judge of the Sixteenth Judicial Circuit, at Mount Clemens, Michigan, on Thursday, April 1, 1976.

Appearances: Freihofer, Hecht, Oosterhouse & De Boer, P.C., 950 Union Bank Building, Grand Rapids, Michigan 49502. By: Mr. Peter R. Tolley, (P-21492) and Mr. George E. Pawlowski, (P-18728), Appearing on behalf of the Plaintiffs and Counter-Defendants; Dank, Kaser & Smith, 44 First Street, Mount Clemens, Michigan 48043. By: Mr. Robert P. Dank (P-12487), Appearing on behalf of the Defendant and Counter-Plaintiff.

* * * *

(51) which were prohibitive or would render the contract impossible to perform. In the absence of that evidence, Count II should fail, must fail, and should be directed in the favor of the Defendant.

As to Count III, which is the count that deals with the allegation that there was a contract executed on the 17th of July, 1974, I say that that count fails for several reasons, the first of which is that it is based upon a

written document which, on its face, shows the execution of the contract by all parties and the inuring of the benefits of the promises of each to each is an absolute requirement to the validity of the contract. It is admitted that the contract was not signed by an essential party, and for that reason there is no obligation springing from that document whatsoever. As to the allegations which have been raised in the course of trial that there were subsequent actions which gave vitality to that document, I would say that there is not one, not one single piece of evidence introduced that would indicate that Macomb had an intention to be bound by a document, by this document, in the absence of the signature by Cle-Tex, the absence of Cle-Tex's agreeing to be bound. I should like to point out that the contract was impossible of performance without Cle-Tex inasmuch as the promises of Dubey were conditioned upon the benefits (52) to be received from the Cle-Tex promises, particularly taken in light of subsequent testimony which shows that Macomb was unable to gain access to the site until numerous considerations were made. A new document was drafted. $10,000.00 was immediately paid, and a subsequent $19,000.00 in royalties were paid. I think the evidence is so overwhelming that the contract could not have been performed as to make it impossible to present that fact to the jury, present the question to the jury.

Thirdly, I would like to point out that even if the documents were binding, that no duty is imposed upon Macomb as a result of binding effect of those documents, such as would give rise to the cause of action because the documents clearly state on their face that there is no obligation on the part of Macomb whatsoever to pay any sums to Earl Dubey & Sons, Inc.

There is absolutely no ambiguity in the drafting of the document. There is no showing that there is any required interpretation of that document, and there is no need to go outside that document for interpretation. It speaks for itself. Now, if the contention is that there are subsequent actions of the parties which give rise to a waiver of Macomb's right to be discreet in paying, which springs out of the implied obligation imposed upon them by the document not signed by Cle-Tex, then I would say that there (53) is a total absence in the record of any testimony that will show, first of all, that Macomb agreed to be bound in the absence of Cle-Tex signing, and, secondly, there is no testimony that shows that Macomb agreed to be bound with a waiver in the absence of the signing of Cle-Tex. On the strength of that, I would say that the Defendant is entitled to a directed verdict on Count III.

As to Count IV, which is mutual mistake, I believe the complaint comes in many parts. Count IV — I take it back — incorporates Count V. Well, Count V is the count which says that there was a mutual mistake committed by the parties in believing that there were materials in the pit and that actually the pit was incapable of performing what the parties believed. I should like to point out that the record demonstrates that at no time did Macomb have any conception of what was in the pit. It had representations by a number of people, but the knowledge of what was in the pit was actually owned by Earl Dubey & Sons, Incorporated, and not by Macomb in any regard. There is an abundance of information in the record showing that the pit, was, in fact, capable of producing the material, and there is absolutely no evidence showing that the pit could not produce the material under the prescriptions of the contract. Certainly, the evidence is overwhelming that 470,000 tons of material, which were***

APPENDIX IV

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR IN THE ALTERNATIVE, FOR NEW TRIAL

(State of Michigan
In the Circuit Court for the County of Macomb)

NOW COMES MACOMB CONCRETE CORPORATION, Defendant and Counter-Plaintiff herein, and moves the Court for an Order setting aside the Judgment entered in the above entitled cause on April 26, 1976, and granting a new trial as to Counter-Plaintiff's Complaint, only.

This motion is made pursuant to GCR 1963, 515.2 and GCR 1963, 527.1. Defendant and Counter-Plaintiff submits that there was presented to the Jury no triable issue of fact in support of Count III of Plaintiff's Second Amended Complaint and that Judgment on said Count should properly have been directed against Plaintiffs herein and the cause submitted to the Jury solely on Counter-Plaintiff's Complaint.

In the alternative, Defendant and Counter-Plaintiff moves the Court for a New Trial on Count III of Plaintiffs' Second Amended Complaint and on Counter-Plaintiff's Complaint herein. Defendant and Counter-Plaintiff submits that the Verdict of the Jury should be set aside for the following reasons:

1. Excessive damages influenced by passion or prejudice were awarded to Plaintiff.

2. Clearly or grossly excessive verdict in favor of Plaintiff and a clearly or grossly inadequate verdict in favor of Counter-Plaintiff.

3. The Verdict is against the great weight of the evidence and contrary to law.

4. Errors of law occurring in the proceeding.

5. Irregularity in the proceedings of the Court and the Order of the Court constituting an abuse of discretion, and

6. Substantial rights of the Defendant and Counter-Plaintiff are materially affected.

WHEREFORE, Defendant and Counter-Plaintiff, MACOMB CONCRETE CORPORATION, moves this Court for an Order setting aside the jury verdict and Judgment entered thereon and for a new trial on Counter-Plaintiff's Complaint.

Respectfully submitted,

DANK, KASER & SMITH

By: Robert P. Dank
44 First Street
Mount Clemens, MI 48043
469-4100

Dated: May 17, 1976

APPENDIX V

BRIEF OF PLAINTIFFS-APPELLEES

(State of Michigan
In the Court of Appeals)

Counter Statement of Questions Involved

I. Whether there was sufficient evidence for the trier of fact to find that both plaintiff and defendant did by their acts and conduct intend to be bound by the subject contract, regardless of the fact that two peripheral parties had not executed the contract.

TRIAL COURT SAID: Yes.

APPELLEE SAYS: Yes.

II. Whether forebearance and extension of time to perform are adequate considerations to make a contract mutually binding?

TRIAL COURT SAID: Yes.

APPELLEE SAYS: Yes.

III. Whether in an action brought for restitution based upon breach of contract, plaintiff's damages are those expenses incurred in attempting to perform the contract, defendant's breach having prevented full performance by plaintiff?

TRIAL COURT SAID: Yes.

APPELLEE SAYS: Yes.

Argument No. II

THE CONTRACT OF JULY 17TH WAS SUPPORTED BY CONSIDERATION AND DID NOT LACK MUTUALITY.

Macomb's next contention was that even if the July 17th agreement was a binding modification of the original contract, Macomb's obligations and duties under it were so illusory that the contract lacked mutuality and/or consideration, and therefore was not binding. In other words, Macomb's position is that it contracted on July 17th to do nothing.

The terms "mutuality" and "consideration" are often used interchangeably. Both terms pose the identical question: Are the parties obligated to perform under the written contract? See *Domas* v *Rossi*, 52 Mich App 311 (1974).

In its appeal, Macomb fails to focus on the truly crucial aspect of July 17th agreement as far as Dubey was concerned — extension of time for Dubey to perform.

The agreement specifically provides:

> "In addition Macomb agrees to the extension of time of performance of the removal agreement of May 28th, as set forth in this agreement". (Appendix p. 42)

The whole objective behind the agreement of the 17th was in fact to extend Dubey time in which to perform the original contract as then modified. Charles King, Macomb's counsel, who drafted that agreement testified:

> "Q. Is it your recollection then that Macomb was attempting to work with Mr. Dubey to permit him to complete the contract in fact?

> A. Yes sir, that was my specific purpose in engineering the agreements of July 17, 1974, to provide a means by which Mr. Dubey could cure his past problems and perform his agreement with Macomb Concrete in as expeditious a manner as possible." (King dep. 64; Appendix p. 73)

This extension was the principal consideration and reason for Dubey not only executing the agreement of July 17th, but also was the consideration for the contemporaneous execution of the promissory note, payable to Macomb Concrete in an amount of up to $543,000.00, Wayne Dubey's personal guarantee of that note and a security agreement by which Dubey gave Macomb a lien on all of its equipment in Texas. Dubey by that contract also agreed to pay the cost of Macomb's expert consultant, Finis White, and in addition to pay for the raw materials (blend) which by the terms of the original contract was an expense to be borne by Macomb. (App. p. 25)

All of the above was to Macomb's benefit and was given in consideration of Macomb's forbearance terminating the initial contract, and on its grant of a time extension to Dubey. This was adequate to make the contract legally binding on both sides:

> "As a rule, an extension of time for the performance of a contract or for the payment of a debt constitutes a sufficient consideration for a contract . . .
>
> Forbearance may constitute a sufficient consideration for a promise. Thus, forbearance from exercising a right or doing an act which one has a right to do is sufficient consideration where such forbearance is requested as

consideration." 17 Am Jur 2d. *Contracts*, Sec. 114; also see *Kennedy* v *Brady*, 43 Mich App 760 (1972).

In addition to the extension of time and forbearance Macomb agreed to the payment of certain creditors of Dubey's which were to be treated as advances against Dubey's remaining contract balance with Macomb. Macomb contends that the payment of creditors was discretionary on their part and therefore they were not bound to make such payments. Not only was the question of whether this item of the contract was discretionary, a question of fact for determination by the fact finder, but moreover, once Macomb commenced performing on that aspect of the contract, by payment of creditors, their obligation in that regard was no longer discretionary and they were estopped from claiming otherwise. See 17 Am Jur 2d *Contracts* Sec. 89, 97.

Even assuming, in arguendo, that the payment of creditors was discretionary and therefore non-obligatory on the part of Macomb, such promise was only one aspect of the consideration given Dubey. And where only one of several promises or agreements made by the contracting party is unenforceable, the contract is not defeated for that reason, since the other promises and considerations alone are sufficient and adequate to make it binding. See *Alderton* v *Williams*, 139 Mich 296 (1905)

It is uncontroverted that Macomb's forbearance and grant of time extension to Dubey was firm and unconditional and not subject to any discretion on the part of Macomb. This alone was adequate and sufficient consideration to make the agreement of the 17th mutually binding.

APPENDIX VI

OPINION

(State of Michigan
Court of Appeals)

(Filed March 7, 1978)

(Earl Dubey & Sons, Inc., a Michigan Corporation, and Sentry Insurance, a mutual company, Plaintiffs-Counter-Defendants-Appellees, v Macomb Concrete Corporation, a Michigan Corporation, Defendant-Counter-Plaintiff-Appellant. No. 77-216)

Before: V. J. Brennan, PJ., and D.E. Holbrook and Rex Martin, JJ.

D. E. HOLBROOK, J.

Plaintiff, Earl Dubey and Sons, Inc., commenced this action for rescission of an agreement as the result of the anticipatory breach by defendant, Macomb Concrete Corporation, and for damages in excess of $300,000. Plaintiff, Sentry Insurance, sought discharge of its liability on a performance bond. Defendant Macomb counter-claimed that plaintiffs were in default under the agreement and Macomb sought damages for fulfilling the contract by other means. Following a five-week trial, plaintiffs' equitable claims were taken from the jury and resolved adversely to plaintiffs by the trial judge. These theories were fraud, misrepresentation, mutual mistake and economic impossibility of performance. However, the trial court ruled that the breach of contract claim should be submitted to the jury. On April 26, 1976, the jury returned a verdict in plaintiff Dubey's favor for $313,661.56. Defendant's

motion for judgment notwithstanding the verdict was denied on September 13, 1976. Thereafter, defendant claimed an appeal as of right to this Court, but on motion of plaintiffs, the claim was dismissed as not timely filed. Defendant then made application for delayed appeal and on June 1, 1977, this Court granted leave.

To have a proper understanding of this case, a complete recitation of the facts is necessary.

Plaintiff Earl Dubey and Sons, Inc. is a Michigan corporation located in Alpena, Michigan, and primarily engaged in the business of excavating, gravel crushing and sand and gravel production.

Defendant Macomb Concrete Corporation, now known as Macomb Contracting Corporation, is a Michigan corporation located in Fraser, Michigan, and is primarily engaged in highway and airport runway construction.

Plaintiff Sentry Insurance was Dubey's surety on certain performance bonds concerning a sand and gravel production contract between Dubey and Macomb.

In 1973, the City of Houston, Texas, decided to resurface runways 14 and 32 of the Houston Intercontinental Airport. Macomb Concrete was one of four bidders for the contract, and was awarded that contract by resolution of the city commission on November 13, 1973. Macomb's bid of $10,057,607 was $2,000,000 less that the next lowest bidder.

In order to construct the concrete overlays for the runways and associated taxiways at the airport, Macomb was required under the city contract to locate

and have available 243,000 tons of aggregate materials which were comprised of 100,000 tons of coarse aggregate (gravel) and 143,000 tons of fine aggregate (sand). The City of Houston's contract carefully specified both the quality and size of the sand and gravel aggregates which could be used for the making of the concrete. It was the various sizes of the fine aggregate (sand) which eventually led to this entire protracted litigation. According to these specifications, with respect to the sand aggregate, out of a 100 per cent sample, a certain percentage had to fall within a certain size category. There were eight such size categories. Specifications were sent out as follows:

Sieve Designation (Square Openings)	Percentage by Weight Passing Sieves
3/8 inch	100
No. 4	95-100
No. 8	65-80
No. 16	45-60
No. 30	30-45
No. 50	15-30
No. 100	5-10
No. 200	0-2

The specifications also specifically proscribed against acquiring the sand aggregates from an area in Texas known as the San Jacinto River basin which is located in close proximity to the City of Houston. This is an area known geologically to contain aggregates much too fine in size to meet the city's contract specifications. Despite this specific proscription, Macomb selected a site near Houston called the Cle-Tex pit from which it

planned to get its sand and gravel. *This pit was located in the San Jacinto River Basin*. Dubey testified that he saw the language in the contract, "local fine, dirty, unsound fine sand (called field sand) as produced from the San Jacinto River or the Montgomery Formation is not permissible" but that William Buck, the vice-president of Macomb Contracting, said that the materials from the Cle-Tex pit could be used and would pass for the qualities required by the City of Houston. Macomb contracted with an engineering firm known as Murillo Testing Company to do an analysis of the Cle-Tex pit. The conclusion of the firm was that the sand and gravel met all the requirements of the specifications except for gradation, but this condition could be remedied by careful quality control during production. The sieve analysis as to the gradation of the sand by the engineering firm indicates that the sand was too fine to meet contract specifications.

Sieve Size	Percent Passing	City Specifications
3/8	100	100
No. 4	98	95-100
No. 8	93	65-80
No. 16	87	45-60
No. 30	75	30-45
No. 50	37	15-30
No. 100	4	5-10
No. 200	-	0-2

Macomb contacted Dubey and negotiated a contract with Dubey to produce the sand and gravel out of the Cle-Tex pit, which then would be delivered to Macomb in Houston to make the concrete for the

airport runways. This contract was executed on January 31, 1974, and required Dubey to produce the required tonnage of coarse and fine aggregates (sand) from the Cle-Tex pit for the contracted price of $543,000. Macomb required of Dubey that it supply performance bonds in such an amount, and such bonds were in fact provided by Sentry Insurance. Dubey was to produce the sand and gravel materials within 180 days or by June 3, 1974.

The contract was signed by Macomb and Dubey after extensive negotiations, including at least four preliminary drafts each containing various modifications. Prior to the execution of the contract, Macomb had advanced $20,000 to Dubey towards expenses of design and shipment of plant equipment. The contract called for further advances of $43,000 upon signing, and an additional $100,000 for plant and site preparation which was paid by Macomb before production was attempted.

Dubey took possession of the Cle-Tex site in February of 1974, and had no difficulty in producing the gravel requirements under its contract with Macomb, but soon discovered the deficiency of the sand deposits and the fact that specification sand could not be made from the Cle-Tex pit. Despite the introduction of special equipment and the development of new and novel mining devices, no specification sand could be produced without wasting up to 60 per cent of the materials being mined at Cle-Tex.

By May of 1974, no specification sand had been produced, although Dubey was producing specification gravel. Macomb then hired a specialist by the name of Finis White who was to work and consult with Dubey in an effort to produce the specification sand. It is not

contested that Mr. White was considered to be the foremost authority in the southwest, if not the country, on sand and gravel production. Like Dubey, he failed to find a way to produce specification sand from the Cle-Tex pit without "blending"; that is, by mixing Cle-Tex aggregates with materials brought in from another site.

By the end of May 1974, and although Dubey had been on the production site for approximately three months, no specification sand could be produced. On May 28, 1974, Dubey and Macomb amended the original contract. This agreement acknowledged difficulties in producing the sand from the Cle-Tex pit, and provided for an extension of time within which Dubey was to complete performance, and also provided that Macomb was to advance against Dubey's original contract price certain payments to creditors. The contract provided that Dubey was to be able to substantially perform within 14 days at the rate of 2,000 tons a day and if it could not produce 20,000 tons between the fourteenth and twenty-fourth day, he was to quit the premises. Macomb advanced $25,000 jointly payable to Dubey and his creditors and also agreed to advance $33,000 to Westinghouse Credit Corporation, the lienholder on Dubey's plant.

The parties operated under the May 28 agreement until the end of June 1974, and at that time no economical way could be found to produce specification sand. Dubey left Texas and returned to Michigan in an attempt to negotiate a further extension of time and still more advances on the contract. In Michigan, Dubey was told by Jim Hicks, Macomb's executive vice-president, that Macomb would not advance Dubey any further funds.

On July 12, 1974, a meeting was held at the offices of Bracewell and Patterson, Macomb's Texas counsel. Present at the meeting were Wayne Dubey; counsel for Dubey; Orville Loos, the president of the leasor, Cle-Tex; counsel for Cle-Tex; a representative from Sentry Insurance, Dubey's bonding company; a representative of Westinghouse Credit and representatives of Macomb. At this meeting, Cle-Tex accused Macomb of being in breach of its lease through the actions of Dubey in allowing a labor and materials lien to attach to the leased pit and threatened to evict Macomb from the leased pit. Discussions occurred about further advances of funds to Dubey and a further extension of time, but no agreement was reached. A further meeting was held sometime between July 12 and July 17. Present were the same parties with the exception of Dubey's counsel. Cle-Tex again alleged a breach of Macomb's lease which created a default and alleged a breach of a June 1 equipment lease by Dubey.

The parties entered into the last amendatory agreement, this one dated July 17, 1974. By this agreement Macomb agreed to further extend time for Dubey's performance and to pay certain of Dubey's creditors as an advance towards his original contract price. These payments to Dubey's creditors were made optional and discretionary with Macomb. In exchange for this, Dubey agreed to perform phase one of the original contract by blending sand from the Cle-Tex pit with a coarser sand found approximately 150 miles north of Houston so as to make specification materials. Phase one would have required about 20,000 tons of specification sand. Dubey agreed to pay the cost of this blend material, although the original contract provided that Dubey was to mine, wash and stockpile materials,

and Macomb was to pay the cost of raw materials. Dubey also agreed to pay the expense of the consultant, Finis White, an expense which was originally that of Macomb.

Earl Dubey and Sons also agreed to provide Macomb with a promissory note payable to Macomb in the amount of the original contract price of $543,000 or so much thereof as Macomb had advanced, a security agreement giving to Macomb as collateral for the promissory note all of Dubey's equipment in Texas and a personal guarantee executed by Dubey's principal, Wayne Dubey, personally guaranteeing the promissory note of July 17.

In addition to Dubey and Macomb, Cle-Tex, Inc., the owner of the Cle-Tex sand pit, and Sentry Insurance were to be parties to this agreement. Dubey and Macomb executed and delivered all of the agreements on July 17 without requiring Sentry or Cle-Tex to execute those documents. Sentry's agent, at the meeting which culminated in the agreement of the 17th, gave approval to the agreements but wanted the home office to execute the documents. They were never signed by Sentry. Cle-Tex also refused to sign the contract.

Pursuant to the terms of the security agreement of July 17, on July 22, 1974, Macomb effectuated the recordation of a UCC financing statement making claim to a security interest in all of Dubey's assets. On July 24, pursuant to those agreements, Macomb paid one of Dubey's creditors, Cle-Tex, in the amount of $10,591.55.

In reliance on the agreements, Dubey began tooling up his operation and ordered the blend materials which

were to be mixed with the sand at the Cle-Tex site. On July 29, 1974, Macomb, through its attorney in Houston, announced by telegram that Dubey was in default, that Macomb was taking possession of the production site and that demand was being made for payment by Dubey of the promissory note and personal guarantee of July 17, 1974. Dubey's plant was closed and the relationship between Dubey and Macomb was ended.

On September 13, 1974, Dubey brought this action in the Alpena County Circuit court against Macomb seeking restitution based upon fraud, misrepresentation, mutual mistake, impossibility of performance and breach by Macomb of its contractual obligations under the agreements between the parties. Macomb filed a motion for change of venue, said motion was granted by the Alpena County Circuit Court Judge and venue was moved to Macomb County Circuit Court on December 9, 1974. Sentry then joined Dubey as a party-plaintiff. On March 12, 1975, Macomb filed a counter-claim against both Dubey and Sentry seeking money damages for breach of contract. The issues were joined for trial by jury which commenced in the Macomb County Circuit Court on March 2, 1976.

The defendant raises four issues on appeal that have been restated and rearranged into three issues for consideration.

The first issue is whether the July 17, 1974 agreement to extend the time of Dubey's performance was binding on Macomb so as to give rise to a cause of action for Macomb's breach where the agreement involved multiple parties, not all of which signed, but where Macomb took action consistent with the agreement in regards to Dubey.

The defendant maintains that the trial court should have granted its motion for a directed verdict because there was no evidence presented by Dubey that defendant Macomb, after learning of the Cle-Tex repudiation of the amended contract, did any act which evidenced an intention to be bound notwithstanding the refusal of Cle-Tex to sign the document.

In *Sexton* v *American Aggregates*, 60 Mich App 524, 530-531; 231 NW2d 449 (1975), the standard for review of a motion for a directed verdict was set out as follows:

> "In reviewing a claim that a motion for directed verdict was erroneously denied, the Court must view evidence in a light most favorable to plaintiff. If, when doing so, the Court determines that there is 'any evidence which was competent and sufficient to support the jury's determination', the jury's resolution of the case should be affirmed." (Cites omitted.)

A motion for judgment notwithstanding the verdict is reviewed even more strictly, since the facts are viewed inferentially in favor of a non-moving party. *Jackson* v *Fox*, 69 Mich App 283, 285; 244 NW2d 448 (1976), *lv den* 399 Mich 863 (1977). With this standard in mind, we review the evidence to see whether the trial judge erred in denying the motion for a directed verdict and for a judgment notwithstanding the verdict.

The July 17, 1974 agreement was to be signed by Dubey, Macomb, Cle-Tex and Sentry Insurance. Although Sentry and Cle-Tex did not sign the agreement, both Dubey and Macomb signed it, along with a security agreement providing for Wayne Dubey's personal guarantee, and a promissory note from Dubey to Macomb.

Where there are multiple parties to a contract, a signatory has the burden of proving that it was the intent of all of the parties that none would be bound unless all signed. *Palman* v *Reynolds*, 310 Mich 35, 39-40; 16 NW2d 657 (1944). In *Wiegand* v *Tringali*, 22 Mich App 230, 234; 177 NW2d 435 (1970), this Court indicated that intent to be bound is a question of fact:

> "[T]hose who do sign the writing may have intended to be bound by its terms even though less than all the named persons sign. Their intention governs. The intention of the parties is a fact to be decided upon the evidence, not by invoking our personal, professional, or judicial experience."

In the instant case, the agreement does not explicitly provide that it is not to be binding untill all parties sign. *Wiegand, supra*, p 235.

Defendant claims that its actions subsequent to the signing of the July 17, 1974 agreement can be explained away and are not evidence of an intent to be bound by the agreement. While these facts might be interpreted in the light sought by defendant, this Court's review of the judgment notwithstanding the verdict motion requires that the facts be taken inferentially in plaintiffs' favor and not defendant's. *Jackson* v *Fox, supra*. While defendant presents a plausible argument that the payment to Cle-Tex was to preserve Macomb's rights under the lease, that Cle-Tex was threatening to forfeit, the payment is consistent with the agreement and must be taken inferentially to support plaintiffs' claim that the payment was made pursuant to the July 17 agreement. The most damaging evidence showing that defendant intended to be bound by the July 17

agreement is the July 29, 1974 telegram in which Macomb claimed the benefit of the note executed pursuant to the agreement. The telegram reads as follows:

> "PMS WAYNE DUBEY, PRESIDENT, DLR
> EARL DUBEY & SONS INC DRAWER 0
> CLEVELAND TX 77327
>
> "Demand is hereby made upon you for immediate payment of the full amount due under that certain promissory note dated July 17, 1974 between Earl Dubey & Sons, Inc. as maker and Macomb Concrete Corporation as payee. This indebtedness is in the principal amount of $178,591.55 plus interest thereon at the rate of 12-1/4 per cent from July 17, 1974, to date. This indebtedness is payable at the offices of payee, Macomb Concrete Corporation, 33180 Kelly Road, Fraser, Michigan, immediately.
>
> "Demand is also hereby made upon you personally for immediate payment of this indebtedness under the guaranty made and entered into by yourself as an individual on July 17, 1974.
>
> "Earl Dubey & Sons, Inc. has not produced contract specified quantities of material under its agreements with Macomb Concrete Corporation, and Earl Dubey & Sons, Inc. is in default of its obligations thereunder. Your attention is respectfully called to Paragraph 3 of the Sand and Gravel Removal Agreement and Bond Approval dated May 28, 1974 entered into by Earl Dubey & Sons, Inc., Macomb Concrete Corporation and Sentry Insurance, a Mutual Company. Under that Paragraph, Earl Dubey & Sons, Inc. agreed that if it could not produce contract quantities of material, it would voluntarily quit the premises and surrender possession of all equipment at or near the site to Macomb Concrete Corporation. Macomb Concrete Corporation has accordingly taken possession of the premises and all equipment at or near the premises previously occupied by Earl Dubey & Sons, Inc. under its agreements with Macomb. Macomb Concrete Corporation will operate the facilities located there in an effort to mitigate the damages sustained by it due to Earl Dubey & Sons, Inc.'s default.
>
> "CHARLES G. KING
> BRACEWELL & PATTERSON
> 1808 FIRST CITY NATIONAL BANK BUILDING
> HOUSTON, TEXAS 77002
> ATTORNEYS FOR MACOMB CONCRETE CORPORATION."

Additionally, defendant claims that there was no evidence that it took any further action in reliance on the July 17 agreement after learning that Cle-Tex would not sign the agreement. This is not supported by the record. James Hicks, an executive vice-president of Macomb, testified as follows:

> "Q. [Plaintiffs' attorney] Now, when did you learn that Cle-Tex had refused to go through with signing the documents that were prepared on July 17th?
>
> "A. Oh, my guess is it was within a day or two after that date."

Therefore, Macomb knew on either July 18 or 19 that Cle-Tex was not going to sign the agreement. However, the security agreement was filed on July 22, 1974. Also, the telegram demanding payment under the July 17 note was dated July 29, 1974. Thus, defendant did take further action after it had knowledge that Cle-Tex would not sign the agreement.

Given the evidence that defendant proceeded under the advantageous portions of the July 17 agreement, this Court holds that there was sufficient evidence for the jury to make a finding of intent to be bound even though the parties other than Dubey and Macomb did not sign the agreement. Thus, there was no error in denying the motion for directed verdict. Additionally, when these facts are viewed inferentially in plaintiffs' favor, no error can be predicated on the denial of the motion for judgment notwithstanding the verdict.

The next issue is whether the July 17 agreement was unenforceable as illusory so as to preclude a finding of defendant's breach inasmuch as the agreement in part gave defendant the option at its sole discretion to make advance payments to plaintiff, but where the agreement also extended the time of plaintiff's performance and was supported by consideration for the extension of time.

Defendant maintains that even assuming, *arguendo*, that defendant evidenced an intention to be bound by the July 17 agreement, the agreement imposed no legal duties on it, as it was completely discretionary with the defendant whether or not to make advance payments to plaintiff. Therefore, the promise was illusory and the contract lacked mutuality of obligation.

The July 17 agreement provided the following in regard to the agreements of Macomb:

> "Contemporaneously herewith, Macomb has agreed to advance to Dubey certain amounts pursuant to a promissory note and security agreement of even date herewith. In addition *Macomb agrees to the extension of time of performance of the Removal Agreement as set forth in this Agreement.*" (Emphasis added.)

The promissory note provided in part as follows:

> "Payee shall have the option at its discretion, but shall be under no obligation whatsoever, to make any advancement either on its own motion or pursuant to a written request by Maker (supported by such documentation as payee may request) that such an advancement be made to satisfy, in whole or part, a debt necessarily incurred in connection with Maker's production of specification materials relating to Houston Intercontinental Airport Contract No. 101."

This provision regarding advancements of money is unenforceable since it is dependent on "the will of the promisor", *Carlson* v *Johnson*, 275 Mich 35, 37; 265 NW 517 (1936). However, this is not the sole promise made by Macomb in the July 17 agreement and it cannot be said that the entire agreement is unenforceable. In *Alderton* v *Williams*, 139 Mich 296, 298-299; 102 NW 753 (1905), the Michigan Supreme Court indicated that a portion of a contract that is unenforceable will not vitiate an entire contract where there are promises that are enforceable. The Court in *Alderton* stated:

> "Plaintiff insists that the contract relied upon by defendants is void for indefiniteness and

> want of mutuality. It is true that in certain particulars the contract is indefinite. * * * We are referred to no authority, and we believe there is no authority, which holds that indefiniteness in details of this character makes an entire contract void."

While *Alderton* is not completely parallel to the instant case, it is reasonable that if portions of a contract are unenforceable by its terms, it will not affect the enforceability of other portions of the contract that are valid.

Although the advance payment portion of the agreement is unenforceable, under paragraph 2.3 of the July 17 agreement, the time for Dubey's performance was extended to September 15, 1974. The extension of time for performance was an enforceable agreement in exchange for Dubey's promises to pay additional sums and personally guarantee the note securing the advancements. This time extension was one of the principal considerations for Dubey not only executing the agreement of July 17, but also for the execution of the promissory note payable to Macomb Concrete in the amount of $543,000 and Dubey's personal guarantee of that note and security agreement by which Dubey gave Macomb a lien on all its equipment in Texas. This consideration was adequate to make the contract legally binding on both sides.

The final issue is whether the jury was properly allowed to award reliance damages to Dubey for defendant's breach of the agreements between the parties.

The jury awarded Dubey $313,661.56 which represented the difference between the expenditures of

Dubey which totaled $542,261,56, minus the prior advances made by Macomb which totaled $178,000 and two improperly included items in Dubey's damage exhibit which totaled $50,600. Thus, Dubey received the amount it spent on this project minus the advance payments by Macomb.

The defendant claims that the foregoing measure of damages is improper, the proper measure being the contract price less the cost of completion. In other words, the non-breacher is entitled to its profit. Furthermore, defendant maintains that plaintiff could not make a profit on this contract because the cost of completion would have exceeded the contract price; therefore, defendant, by preventing Dubey's performance, kept Dubey from incurring a loss on the contract. Thus, defendant is only liable for nominal damages.

Expenses as an alternative remedy for breach of a contract are discussed in 17 CJ, Damages, § 172, pp 855-856:

> "(5) Prevention of Performance. Where, without fault on his part, one party to a contract who is willing to perform it is, by the other party, prevented from doing so, the primary measure of damages is the amount of his loss, or as it has been otherwise expressed, the value of his contract which may consist of two distinct items, the one being the party's reasonable outlay or expenditure toward performance, and the other the anticipated profits which would have been derived from performance. Plaintiff is entitled to recover the amount which he has upon the faith of the contract fairly and in good

> faith laid out and expended, and the loss upon material on hand at the time defendant refused to permit him to perform his agreement, together with a fair allowance for his own time and services. Profits may be too remote and speculative to be capable of the clear and direct proof required by law, and in such a case plaintiff is confined to his loss of actual outlay and expense. Failure to prove profits, however, will not prevent a recovery for outlay and expense." (Footnotes omitted.)

See also, 17 ALR2d 1327, § 9. This approach was adopted by the Michigan Supreme Court in *Tross* v *H E G Clarke Co*, 274 Mich 263, 265-266; 264 NW 365 (1936), wherein the Court stated:

> "Generally speaking, the measure of damages would be loss of profits to plaintiff from the prevention of performance. But where the profits are wholly speculative and unprovable, the one who prevents performance may not go scot-free.
>
> " 'Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures.' *United States* v *Behan*, 110 US 338, 344 (4 Sup Ct 81.)
>
> "Where profits are speculative, the measure of damages is the actual expenditures and value of services reasonably spent in a *bona fide* attempt to perform the contract or reasonably expended upon the faith of the contract. *United States* v *Behan, supra*; 17 CJ p 855; *Feldman* v *Wear-U-Well Shoe Co*, 191 Mich 73 [157 NW 395 (1916)]."

Therefore, plaintiff could properly seek reliance damages based on the reasonable expenses incurred attempting to perform the contract.

Defendant claims that Dubey would have lost money if it had completed the contract. We point out that the executive vice-president of Macomb, James Hicks, testified that Dubey would have been paid additional sums beyond the $543,000 contract price had Dubey completed the contract.

Defendant's argument that the expenses for which Dubey recovered were attributable prior to the July 17 amended agreement is generally correct. However, this does not change our decision because the agreements of January 31, May 28 and July 17 should be viewed as a whole. In fact, the July 17 agreement provides:

> "*Provisions of Other Agreements.* All provisions of the Removal Agreement,[1] the Amendment,[2] and the Equipment Lease in effect immediately prior to the execution hereof shall remain in effect unless specifically amended herein. The Removal Agreement, as amended, and the Equipment Lease shall be deemed to be amended by this Agreement to the extent specifically set forth herein. In addition, Macomb and Cle-Tex, by their execution hereof, do not waive any claim, demand, action or cause of action against Dubey or Sentry arising from, out of or in any manner connected with such agreements."

So viewed, the contractual relationship between the parties is indivisible and the reliance damages cannot be apportioned between the original and the subsequent agreement for extension of time.

Affirmed. Costs to defendant.

---

[1] The January 31, 1974 agreement.

[2] The May 28, 1974 agreement.

APPENDIX VII

APPLICATION FOR REHEARING

(State of Michigan
In the Court of Appeals)

Defendant and Counter-Plaintiff-Appellant, MACOMB CONTRACTING CORPORATION, by its attorney, ROBERT P. DANK, makes this Application for Re-hearing of this cause pursuant to General Court Rule 819.4 and states:

1. The reasons for this Application are:
   - A. The Court has Ignored Facts and Assumed Facts Not in Existence Which are Significant and Material to a Proper Decision;
   - B. The Court of Appeals Decision has Left an Important Issue Unresolved;
   - C. The Resolution of the Matter by the Court of Appeals Decision is Unclear; and
   - D. The Court has Failed to Apply Prior Case Law Without an Explanation.
2. This Application is based upon the record herein, the Affidavit of Robert P. Dank attached hereto and the Brief in Support of Application for Rehearing.

WHEREFORE, Defendant and Counter-Plaintiff-Appellant respectfully requests the Court to grant this Application for Re-hearing, reconsider the cause and reverse the decision of the Trial Court and remand the cause for new trial on the Counter Complaint of Appellant.

ROBERT P. DANK, P.C.
By: Robert P. Dank
14 First Street
Mount Clemens, MI 48043
469-4100

Date:
March 13, 1978

BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

A.

THE COURT HAS IGNORED FACTS AND ASSUMED FACTS NOT IN EXISTENCE WHICH ARE SIGNIFICANT AND MATERIAL TO A PROPER DECISION.

The Court's Opinion adopts as fact:

> On July 29, 1974, Macomb, through its attorney in Houston, announced by telegram that Dubey was in default, that Macomb was taking possession of the production site and that demand was being made for payment by Dubey of the promissory note and personal guarantee of July 17, 1974. Dubey's plant was closed and the relationship between Dubey and Macomb was ended. (Opinion p. 8)

This adopted fact assumes that Dubey was operating on the 29th of July.

Satisfied with this assumption, this Court then apparently construed the telegram by Appellant's attorney, Charles King, to Appellee Dubey as an act in breach of a duty to forebear until September 15, 1974 for Dubey's completion.

Unhappily, this assumed fact is in conflict with the evidence. The evidence *all* shows that Dubey's sand and gravel processing plant was repossessed by Westinghouse Credit Corporation on July 26:

Wayne Dubey (at pp 78-79)—

> Q. When did they call you?
>
> A. It was about a week or so after the agreements.

Q. What did Westinghouse do as a result?

A. They repossessed the plant a short time after that.

Q. On what day?

A. I can't give you the exact day. They first called and said to shut the plant down, and that was followed up by a telegram, as I recall, that they were repossessing it.

Q. When did they call you?

A. It was about a week or so after the agreements.

Finas White (at p. 83 and his notes)—

Q. As I understand the chronology here your notes reflect that when Dubey told you on July 26th that he had received a call from Westinghouse telling him to shut the plant down, they were going to repossess it?

A. I think it was on the 27th. He had just come out of the office, I was out at the plant, I think we were making a blend; July 26th, Friday.

The entire trial record is so replete with this uncontroverted fact that Appellees' counsel was prompted to remark in final argument:

> Now, the agreements were signed by Howard Martin, then the project superintendent for Macomb Contracting, and Wayne Dubey. They were signed in Mr. King's office on the 26th day of July. Nine days later, Westinghouse Corporation foreclosed on the plant owned and operated by Earl Dubey & Sons, *and that brought an end to this ability to perform production of sand and gravel, no question about that.* The reason Westinghouse foreclosed is obvious to all of us, they didn't get paid. (Transcript April 2, 1976, p 25) (emphasis supplied).

Counsel was slightly incorrect when he referred to the 26th as the date of signing. The documents were signed on the 17th, and nine days from that point is the 26th.

Thus, when the Court in its opinion assumed that the Plant was closed on the 29th of July, in response to the Telegram of the attorney in Houston announcing the taking of the site, that assumption was inconsistent with the facts and incorrect as a basis for further legal rulings.

B.

THE COURT OF APPEALS HAS LEFT AN IMPORTANT ISSUE UNRESOLVED.

Unresolved in the Court's Opinion is the question raised by Question #1 of Appellant's Brief on Appeal: whether Appellant breached the Agreement of July 17, 1974?

The claimed duty and breach were fully framed in Count III of the Amended Complaint of Appellees:

> "2. The Defendant repeatedly promised the Plaintiff, Earl Dubey & Sons, Inc., that it would advance said Plaintiff such further sums as necessary, up to the total contract price of $543,000, to enable said Plaintiff to complete performance of said contract, and the parties entered into an extension agreement for said purpose date July 17, 1974, including promissory note, security agreement, and guaranty agreement and UCC forms, all of which documentation are in the possession of the Defendant, Macomb Concrete Corporation."

3. The Defendants agreed to advance the Plaintiff certain sums, up to the contract price of $543,000.00, for the purchase of extraordinary equipment so as to enable Plaintiff to further refine the available raw materials, and thereby attept to obtain the proper ratio of gravel materials so long as Plaintiff's proposed expenses were approved by the Defendant's consultant, Finis White.

4. Included in the agreements of the Defendant and representations made by it to the Plaintiff was the agreement to pay certain sums to Westinghouse Credit Corporation to which Plaintiff had become indebted for the purchase of equipment for use in Texas.

5. Contrary to its agreements and representations to the Plaintiff, the Defendant did not advance sums to the Plaintiff, which Plaintiff deemed necessary for the acquisition of additional equipment, and it did not make payment to Westinghouse Credit Corporation, as it had agreed to do.

6. Defendant's failure and refusal to advance the sums as promised to the Plaintiff constitutes a breach of the agreements and amended agreements between the parties hereto of such a material and substantial extent that Plaintiff is excused from further performance thereunder, and Plaintiff is entitled to damages for Defendant's breach.

WHEREFORE, ..."

Thus, the sole duty and breach pleaded and tried was the duty to pay advances to Appellee Dubey, and the claimed failure to do so.

The Course of the trial brought forth no new alleged breaches, and Appellant made no defense to same. Had issues been raised, without notice in the pleadings, Appellant would certainly have been prejudicially surprised.

The singleness of this issue is best exemplified in the following excerpts from the final argument of Appellees:

> There is not any doubt that there was an agreement, there can't be, and there's not any doubt that Westinghouse was supposed to be paid. Now, if Westinghouse had been paid, the plant wouldn't have been taken back, and we would have a different ballgame, but the fact remains that that is a breach of contract. I'll grant you that up until the 17th of July, they had been working on a problem. Dubey had not provided them with the 234,000 tons of material. I don't deny that, but they signed these agreements on the 17th to try to solve that problem. (Trial Transcript, April 2, 1976, p. 48)

and again at page 49:

> Now, what happens after the agreement is breached? Well, there isn't any question that it's breached in my opinion because they didn't pay Westinghouse, and both Chuck King and Howard Martin have already told you that Westinghouse was to be paid. There's no doubt about that now, I think. So, when they weren't paid, that was the worst possible thing, the worst way in which Macomb could have breached this contract if they were going to breach it, as apparently they were as of the 19th, two days after they signed it. The worst way

they could breach it is not to pay Westinghouse because there goes the plant.

The issue which the Court has not resolved was raised early in the proceedings with a Motion for Summary Judgment. That Motion stated:

2. That the legal duty of the Defendant is described in the contract labeled Exhibit A attached to the Plaintiff's Complaint and that under the terms of said Contract there is no obligation on the part of the Defendant to perform as set forth in the allegations contained in Count III.

This Motion was argued February 23, 1976 and taken under advisement by the Trial Court.

Pages 19 and 20 of the Howard Martin deposition demonstrates by example the fact that this issue was continuously raised in proceedings before and during trial.

Appellant also raised this argument in its Motion for Directed Verdict:

> Thirdly, I would like to point out that even if the documents were binding, that no duty is imposed upon Macomb as a result of binding effect of those documents, such as would give rise to the cause of action because the documents clearly state on their face that there is no obligation on the part of Macomb whatsoever to pay any sums to Earl Dubey & Sons, Inc. There is absolutely no ambiguity in the drafting of the document. There is no showing that there is any required interpretation of that document, and there is no need to go outside that document for interpretation. It speaks for itself. (Trial Transcript April 1, 1976, p. 52).

The issue was again raised in the Motion for Judgment Notwithstanding the Verdict or for New Trial. (See Brief, Issue #2, pp 13-21).

Appellees position throughout the trial on this issue was the same as their position stated on Page 21 of their Brief here, that Macomb was estopped to exercise its discretion, and further that the clause in the promissory note was illegal, as it was against public policy.

The Court below and this Court have overlooked this issue as it relates to the alleged breach by Appellant, although this Court has now ruled:

> "Payee shall have the option at its discretion, but shall be under no obligation whatsoever, to make any advancement either on its own motion or pursuant to a written request by Maker (supported by such documentation as payee may request) that such an advancement be made to satisfy, in whole or part, a debt necessarily incurred in connection with Maker's production of specification materials relating to Houston Intercontinental Airport Contract No. 101.
>
> This provision regarding advancements of money is unenforceable since it is dependent on "the will of the promissor", *Carlson* v *Johnson*, 285 Mich 34, 34; 265 NW 517 (1936). (Opinion p. 13)

This Court in its opinion ought to have extended the above-stated ruling to state that being unenforceable, the provision regarding advancements of money imposed no duty upon Appellant and could not have been set up as a basis for breach of the July 17, 1974 contracts.

C.

THE RESOLUTION OF THE MATTER BY THE COURT IS UNCLEAR.

Notwithstanding the fact that the pleaded breach of contract by Appellant was failure to make advancements of money, and the Court on page thirteen (13) of its Opinion ruled that the provision of the July 17, 1974 Agreement is unenforceable, the Court apparently found Appellant had breached the agreement in some other fashion.

It can only be assumed that the Court applied its misunderstanding of the facts (See A., Supra) to an issue raised by Appellees for the first time on appeal, being a lack of forbearance on the part of Appellant to allow Dubey until September 15, 1974 to complete the work.

If this is the Court's rationale and holding, it is greatly prejudicial to Appellant and the Judicial process. While such forbearance may be a consideration for entering into the agreement, it was never pleaded, or raised as an issue as the breach by Appellant. Moreoever, there are no facts on the record to support such a contention.

Had Appellant been faced with such an issue, an infinite array of evidence could have been produced to show that Dubey had ceased all operations and his plant was repossessed by creditors before any action was taken by Macomb to enter the site and begin its own production.

The most concise example of the framing of this point thoughout trial can be seen in appellee's final argument to the jury:

> Now, the agreements were signed by Howard Martin, then the project superintendent for Macomb Contracting, and Wayne Dubey. They were signed in Mr. King's office on the 26th day of July. Nine days later, Westinghouse Corporation foreclosed on the plant owned and operated by Earl Dubey & Sons, and that brought an end to this ability to perform production of sand and gravel, no question about that. The reason Westinghouse foreclosed is obvious to all of us, they didn't get paid.
>
> Everyone knew and you heard the testimony — there's no dispute about this — everyone knew that if Westinghouse wasn't paid, they were going to take back the plant, and everybody knew without the plant there wasn't going to be any production, no 70 percent blend, 80 percent, no nothing. That would be the end of it. So, Westinghouse was a critical, critical creditor to everyone. In fact, Macomb had previously advanced money in May or June to pay them. So, they were fully aware of the importance of paying Westinghouse. (Transcript April 2, 1976, p. 25)

Forbearance as a duty was never raised at Trial. It cannot be philosophically reconciled with the argued position of Appellees, supra, that as of July 26th, . . . "There wasn't going to be any production, no

70 percent blend, 80 percent, no nothing. That would be the end of it."

The telegram of Charles King asking for possession of the site followed this "end of it" by three (3) days.

Had the issue of an alleged breach of duty to forebear been raised by pleadings or even at trial, instead of for the first time on appeal, Appellants could have alleged and proven that the repossession by Westinghouse Credit Corporation, as a matter of law, excused Appellant from further forebearance. The law of Michigan is clear that where one party to a contract puts its performance out of his power, the other party has an immediate right of action, *Sheahan* v *Barry*, 27 Mich 217, 223 (1973); *Adams* v *E. M. Burke Homes, Inc*, 14 Mich App 578, 590 (1968) (concurring opinion of Judge Levin); see also, 17 Am Jur 2d Contracts §453. Appellant was denied its opportunity to prove, as a defense to Appellees' action, that the repossession by Westinghouse Credit of Appellee's entire plant so completely rendered performance by Appellee impossible that further forbearance by Appellant was not required and an immediate right to action arose.

As above stated, the issue of lack of forbearance as an alleged breach of the contract was not raised in Appellee's pleadings, although Appellees' Complaints were amended twice before the case went to trial (see Argument B, *supra*). Nor was lack of forbearance as the alleged breach of contract ever raised at the trial of this cause so as to effect an amendment of the pleadings to conform to the evidence pursuant to GCR 1963, 118.3. As such, this new legal theory of recovery was raised first by Appellees' Brief on Appeal and then by this Court's Opinion. This theory was not raised at the trial court level either by pleadings or proofs and should not

have been considered by this Court, *Security Ins Co of Hartford* v *Daniels*, 70 Mich App 100 (1976); *Ptasznik* v *Johnston*, 63 Mich App 410 (1975); *Furstenberg Brothers* v *Carrollton Twp*, 61 Mich App 230 (1975).

D.

THE COURT HAS FAILED TO APPLY PRIOR CASE LAW WITHOUT AN EXPLANATION.

The Court has in its opinion quoted with approval from *Tross* v *HEG Clarke Co*, 274 Mich 263, 265-266 (1936) to sustain Appellee's position that, in a proper case, reliance damages may be awarded in a breach of contract case. Appellant accepts the Court's proposition but strenuously claims that the proposition is both legally and factually inapplicable in the instant case.

Appellant has always taken the position that nowhere on the record is there any evidence that Appellee's profits were "wholly speculative and unprovable" as required by *Tross, supra:*

> Generally speaking, the measure of damages would be loss of profits to plaintiff from the prevention of performance. But where the profits are wholly speculative and unprovable, the one who prevents performance may not go scot-free. pp 264-5.

In *Nurmi* v *Beardsley*, 284 Mich 165 (1938), the Supreme Court ruled that where a Plaintiff was prevented from completing a contract by unjustifiable acts of the Defendant, and his profits could be proved, recovery on quantum meruit was not appropriate:

> Clearly, under the findings of fact by the trial court and which we find to be supported by the

> record, the plaintiff was prevented from carrying out and performing his contract by the unjustifiable acts of defendants. The defendants breached their contract which resulted in loss of profits to the plaintiff which plaintiff was able to ascertain and prove and did prove to the satisfaction of the trial court. There is no merit to the contention of defendants that this contract was not apportionable and that recovery could only be had on a *quantum meruit*, p. 177.

Absent this necessary showing of wholly speculative and unprovable profits, Appellee should not be allowed to recover reliance damages. This Court's failure to apply the rule of *Tross, supra,* which requires a showing that profits are wholly speculative and unprovable before allowing reliance damages is without explanation.

Additionally, the trial court did not allow the jury to award reliance damages. (Transcript, April 7, 1976, p 72). The jury was only allowed to find damages adequate to "place the injured party in the same position he would have occupied had the agreements been fulfilled or the agreements been fulfilled or the agreements had not been breached". Assuming *arguendo,* that Appellant breached the contract, the jury was only allowed to find as damages that amount that would put Appellee in the same position had the contract been fulfilled, i.e. had the funds been advanced and had Appellee completed the contract. As such, the damages would properly have been the contract price minus the cost of completion. By its affirmance of the lower court judgment, this Court allows the trial court's instruction to be retroactively

changed from "where Appellee would have been had there been no breach" to "where Appellee was prior to the formation of the Contract". The jury could not legally find damages in an amount adequate to compensate Appellee for monies spent on the project under the Court's instructions and the Judgment should be reversed.

Respectfully submitted,

ROBERT P. DANK, P.C.

Date: March 13, 1978

APPENDIX VIII

AFFIDAVIT IN SUPPORT OF APPLICATION FOR REHEARING

(State of Michigan
In the Court of Appeals)

State of Michigan
County of Macomb—ss.

ROBERT P. DANK, being first duly sworn, deposes and says:

1. He is the attorney for Appellant and has represented Appellant at each and every stage of the proceedings herein.

2. At no time in the captioned proceedings prior to Appellee's filing of their Appellate Brief, was lack of forbearance as a breach of contract pleaded, or otherwise raised by Appellees. Further, Appellant met this issue before the Court of Appeals in its Oral

Argument, but affiant, believes from reading the Court's Opinion that Appellant's point was misunderstood by the Court.

3. Had Appellant's failure to forbear to September 15, 1974 been pleaded, Appellant could have presented proofs, demonstrating a waiver of forbearance by Appellees at the trial, that were not presented.

4. He has read the Application for Rehearing filed herewith and believes the statements contained therein to be true to the best of his knowledge.

Robert P. Dank

Subscribed and sworn to before me this —— day of March, 1978

Victoria A. Luchtman
Notary Public
Macomb County, Michigan
My commission expires: July 22, 1978

APPENDIX IX

ORDER DENYING APPLICATION FOR REHEARING

(State of Michigan
In the Court of Appeals)

At a Session of the Court of Appeals of the State of Michigan, Held at the Court of Appeals in the City of Detroit on the 12th day of April in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable Vincent J. Brennan, Presiding Judge; Donald E. Holbrook, Rex B. Martin, Judges.

(Earl Dubey & Sons, Inc, a Michigan corporation, and Sentry Insurance, a mutual company, Plaintiffs-Counter-Defendants-Appellees, v Macomb Concrete Corporation, a Michigan corporation, Defendant-Counter-Plaintiff-Appellant. Docket # 77-216)

In this cause an application for rehearing having been filed by defendant-appellant, and an answer in opposition thereto having been filed by plaintiff-appellee, and due consideration thereof having been had by the Court,

IT IS ORDERED that the application for rehearing be, and the same is hereby, DENIED for lack of merit in the grounds presented.

CERTIFICATION

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause, that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 18th day of April in the year of our Lord one thousand nine hundred and seventy-eight.

/s/ Ronald L. Dzierbicki
Clerk

APPENDIX X

MICHIGAN GENERAL COURT RULES

Rule 853 Appeals from Decisions of Court of Appeals.

.1 Grounds. Appeal may be taken to the Supreme Court only upon application and leave granted, in the discretion of the Supreme Court, from any decision of the Court of Appeals, interlocutory or final, upon a showing of a meritorious basis for appeal and any one of the following grounds.

(1) The subject matter of the appeal involves legal principles of major significance to the jurisprudence of the State.

(2) The decision of the Court of Appeals is clearly erroneous and will cause material injustice.

(3) The decision is in conflict with decisions of the Supreme Court or other Court of Appeals decisions.

(4) In any appeal of an interlocutory order of the Court of Appeals, it must be shown that appellant would suffer substantial harm by awaiting final judgment before taking appeal.

.2 Application for Leave to Appeal.

(1) Application for leave to appeal to the Supreme Court shall be filed with the clerk of the Supreme Court within 20 days after mailing by clerk of the Court of Appeals of notice to counsel of entry of the order of the Court of Appeals or the denial of an application for rehearing timely filed. Application for leave to appeal and brief in support thereof shall be filed in form and

manner and proceedings had thereon as provided in sub-rule 852.2. Each copy of the application for leave to appeal shall be accompanied by a copy of the opinion and order of the Court of Appeals and the opinion, order and finding of the trial court or other tribunal. The filing of a copy of an application for leave to appeal to the Supreme Court with the clerk of the Court of Appeals shall constitute notice to the clerk of the Court of Appeals to forward to the clerk of the Supreme Court the record on file with the Court of Appeals.

(a) Unless otherwise ordered by the Court, appeals shall be limited to the issues raised in the application for leave to appeal.

(b) Upon motion of any party, for good cause shown, the Court may grant a request to add additional issues not raised in the application for leave to appeal or in the order granting leave to appeal. Permission to brief and argue such additional issues shall not extend the time for filing of briefs and appendices.

(2) A copy of the order granting or denying leave to appeal shall be forwarded by the clerk of the Supreme Court to the clerk of the Court of Appeals and to the parties. If the application for leave to appeal is denied, the decision of the Court of Appeals shall become the final adjudication and shall be enforced in accordance with its terms. If the application for leave to appeal is granted, all jurisdiction over the cause shall thereafter be vested in the Supreme Court and the rules applicable to appeals to the Supreme Court shall apply. After granting of the

application for leave to appeal, all relevant papers and documents on file with the clerk of the Court of Appeals shall thereupon be transmitted to the clerk of the Supreme Court.

(3) Delayed application for leave to appeal may be filed upon a showing by affidavit of facts that the delay was not due to appellant's culpable negligence but no such application shall be filed later than six months after the decision of the Court of Appeals.

(4) Upon any application for leave to appeal, the court on its own motion or by stipulation of the parties, may in lieu of leave to appeal enter a final decision or issue an appropriate peremptory order.

(5) Application for leave to appeal to the Supreme Court, as cross-appellant, shall be filed with the Clerk of the Supreme Court by the date appellant's application for leave to appeal is noticed for hearing or by a date which is 21 days after appellant's application was filed, whichever is later. Applications for leave to appeal, as cross-appellant, and brief in support thereof, shall be filed in form and manner and proceedings had thereunder as provided in subrule 852.2.

.3 Stay of Proceedings. The provisions of Rule 808 shall be applicable in like manner to appeals to the Supreme Court. When a stay bond has been filed on the appeal to the Court of Appeals as provided in Rule 808, it shall operate to stay proceedings pending disposition of the appeal in the Supreme Court unless otherwise ordered by the court.

[Amended March 1, 1967; May 7, 1975.]

APPENDIX XI

APPLICATION FOR LEAVE TO APPEAL

(State of Michigan
In the Supreme Court)

Defendant-Appellant Macomb Concrete Corporation, hereby applies to this Honorable Court for Leave to Appeal from the Opinion of the Court of Appeals dated March 7, 1978 and from the Order Denying Defendant-Appellant's Application for Rehearing dated April 18, 1978 by V. J. Brennan, PJ., D. E. Holbrook and Rex Martin, JJ., for the following reasons:

a) The subject matter of the appeal involves legal principles of major significance to the jurisprudence of the State, and

b) The decision of the Court of Appeals is clearly erroneous, will cause material injustice, and has resulted in a denial of due process of law guaranteed by the Constitutions of the United States and the State of Michigan.

c) The decision is in conflict with decisions of the Supreme Court and other Court of Appeals decisions.

Attached hereto are copies of the decisions of the Court of Appeals, a copy of the Judgment of the Circuit Court of Macomb County, Michigan entered in this cause, and Brief of Plaintiff-Appellant in support of this Application which contains a concise statement of the proceedings and facts so far as they are material.

ROBERT P. DANK, P.C.
Attorneys for Defendant-Appellant
By: /s/ Robert P. Dank (P12487)
14 First Street
Mount Clemens, MI 48043
469-4100

Date:
May 4, 1978

APPENDIX XII

BRIEF OF DEFENDANT-APPELLANT IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

(State of Michigan
In the Supreme Court)

* * *

STATEMENT OF QUESTIONS PRESENTED

I

WHERE THE ONLY ALLEGED DUTY CONTAINED IN A COMPLAINT FOR CONTRACT DAMAGES IS RULED BY THE COURT OF APPEALS, AS A MATTER OF LAW, TO BE "UNENFORCEABLE", IS IT ERROR FOR THE COURT TO REFUSE TO REMAND TO CIRCUIT COURT FOR RULINGS ON MOTIONS FOR SUMMARY JUDGMENT, DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT THAT ARE CONSISTENT WITH THAT RULING?

The Court of Appeals answered this question "No"

The Defendant-Appellant contends the answer should be "Yes"

II

WHERE THE ONLY ALLEGED DUTY CONTAINED IN A COMPLAINT FOR CONTRACT DAMAGES IS RULED BY THE COURT OF APPEALS, AS A MATTER OF LAW, TO BE "UNENFORCEABLE", IS IT ERROR FOR THAT COURT TO AFFIRM A TRIAL COURT JUDGMENT, BASING ITS AFFIRMANCE UPON A THEORY OF LIABILITY THAT WAS NEITHER PLEADED NOR TRIED?

The Court of Appeals answered this question "No"

The Defendant-Appellant contends the answer should be "Yes"

III

WHEN, IN A SUIT FOR BREACH OF CONTRACT, PLAINTIFF HAS FAILED TO SHOW THAT HIS PROFITS ARE TOTALLY SPECULATIVE, CAN THE PROPER MEASURE OF DAMAGES BE THE TOTAL OF PLAINTIFF'S EXPENDITURES INCURRED WHILE PLAINTIFF IS IN BREACH?

The Trial Court answered this question "Yes"

The Court of Appeals answered this question "Yes"

The Defendant-Appellant contends the answer should be "No"

CONCISE STATEMENT OF FACTS AND PROCEEDINGS

Macomb Concrete Corporation (hereinafter "Macomb") is a general contractor engaging in large construction projects. In 1973 it was the successful bidder on a project to construct runways at the Houston (Texas) Intercontinental Airport, which work was to be performed in 1974.

Earl Dubey & Sons, Inc. (hereinafter "Dubey") was a general contractor and producer of sand and gravel materials for construction, having operated several sand and gravel pits in the upper part of the lower peninsula of Michigan through its President, Wayne Dubey.

Macomb vice-president, William Buck, was a personal friend of a registered civil engineer employed by Dubey (Tr. Vol II, p. 128). Discussions between these friends led to Wayne Dubey and the civil engineer flying to Cleveland, Texas to examine a site for possible operations to mine, wash and stockpile a difficult sand specification written into the Airport contract for Macomb which specification had been given to them (Tr. Vol II, p. 135; Vol III, p. 147 and 148).

Following these visits (Wayne Dubey made three (3) visits) Macomb leased a site for mining the material from a Texas Corporation named Cle-Tex Materials, Inc., (Exhibit 13 and Tr. Vol III, p. 196)). This lease mentioned Dubey as the operator to be used by Macomb.

After extensive negotiations, including at least four preliminary drafts, each containing various modifications (Tr., Vol III at 205-107), Macomb and Dubey entered into an agreement by which Dubey was obligated to mine, wash and stockpile approximately 470,000 tons of gravel materials from the Cle-Tex site. The agreement provided that from this material, Dubey would produce 234,000 tons of sand which would meet the difficult specifications contained in the contract documents entered into between Macomb and the City of Houston. (Plaintiffs' Exhibit 1; Tr. Vol IV pp. 214-215).

Under terms of the contract signed January 31, 1974, Dubey was to complete the contract requirements within 120 days or by June 3, 1974 (Tr. Vol IV at 216). Sentry Insurance gave Macomb a bond guaranteeing Dubey's performance. Prior to execution of the contract, Macomb advanced $20,000.00 to Dubey toward expenses of design and shipment of plant equipment (Pl. Ex. 29; Tr. Vol III, pp. 221-222). The contract called for further advances of $43,000.00 on signing, and an additional $100,000.00 for plant and site preparation, which was paid by Macomb before production was even attempted (Tr. Vol III, pp. 225-226).

Dubey took the site immediately and was set up and began production in mid March, 1974, (Tr. Vol II at 49). However, as late as the end of May, Dubey had not

produced any specification sand (Tr., Vol II at 63). Under pressure from creditors, Dubey requested further advances and an extension of the time of performance (Tr., Vol II at 63-64, Vol IV at 332-334). By agreement amendment dated May 28, 1974, Macomb advanced another $25,000.00 jointly payable to Dubey and his creditors and further agreed to advance $33,000.00 to Westinghouse Credit Corporation, the lien holder on Dubey's plant. Time for performance under this amendment was extended to allow Dubey to produce 20,000 tons of sand per day within 14 days (Pl. Ex. 11).

Dubey had hoped that the problem of producing specification sand might possibly be cured by the addition of a classifier to his plant (Tr., Vol IV at 318). A classifier that was currently in use by Cle-Tex Materials, Inc. (Cle-Tex), the owner of the pit was leased to Dubey under another amendment to the January 31, 1974, agreement dated June 1, 1974, (Pl. Exhibit 31). A further extension of time was granted by Macomb in connection with the lease of this classifier from Cle-Tex (Pl. Ex. 31, Tr., Vol IV at 336-338) which allowed Dubey to begin producing 2,000 tons of sand per day by June 17, 1974.

Dubey was totally unable to produce specification sand under any of these extentions or contract modifications (Tr. Vol II at 68, Vol IV at 347, Vol V at 351-354). Dubey did not vacate the site as required by the June 1 amendment (Tr., Vol II at 68). Instead, Wayne Dubey left Texas and returned to Michigan in an attempt to negotiate a further extension of time and still more advances on the contract with Macomb. In Michigan, Dubey was told by Jim Hicks, Macomb's Executive Vice-President, that Macomb would not advance Dubey any further funds (Tr., Vol II at 69).

On July 12, 1974, a meeting was held at the offices of Bracewell & Patterson, Macomb's Texas counsel. Present at the meeting were Wayne Dubey, Counsel for Dubey, Orville Loos, the President of the Lessor, Cle-Tex, counsel for Cle-Tex, a representative from Sentry Insurance, a representative of Westinghouse Credit Corporation and representatives of Macomb and its counsel (Tr., Vol II at 70, 71; Vol V at 366-367).

At this meeting, Cle-Tex accused Macomb of being in breach of its lease of the site, through the actions of Dubey in allowing a labor and materials lien to attach to the leased pit and threatened to evict Macomb from the leased pit. (Tr., Vol V at 369-370). Discussion occurred about further advances of funds to Dubey and a further extension of time but no agreement was reached (Tr., Vol V at 371, 374-375).

A further meeting was held sometime between July 12 and July 17. Present were the same parties with the exception of Dubey's counsel (Tr., Vol V at 375). Cle-Tex again alleged a breach of Macomb's lease of the site, which created a default and alleged a breach of the June 1 equipment lease by Dubey (Tr., Vol V at 376). The parties agreed that in consideration for essential concessions from Cle-Tex, forgiving the past breaches by Dubey, and Sentry Insurance acknowledging that the proposed amendment did not prejudice its rights as surety, Macomb would once again extend the time for Dubey's performance and would have the power to make optional and discretionary advances of additional funds to Dubey's creditors and to Dubey for the purchasing of blend sand (Tr., Vol V at 376, 377-382, Pl. Ex. 15).

Documents were drawn attempting to put the agreement in writing, including: Agreement (Pl. Ex. 15), Note (Pl. Ex. 17), Security Agreement (Pl. Ex. 16) and Guaranty (Pl. Ex. 18), (Tr., Vol V 376).

The Agreement was signed by Macomb and Dubey on July 17, 1974, and forwarded to counsel for Cle-Tex for his study and approval prior to the signature of Cle-Tex (Pl. Ex. 15). Cle-Tex, although a necessary and essential party to performance, refused to execute the Agreement, (Tr., Vol V at 380-382, 391, Vol V at 455, 457) and Sentry never signed the agreement (Tr Vol VI at 455), although provisions for their performance and signatures were provided in the documents.

A short time later, when Macomb learned that Cle-Tex had refused to execute the Agreement, it decided not to go forward with the proposed unsigned agreements because of Cle-Tex's refusal to become a party to the Agreement and because of production problems at the Houston Intercontinental Airport caused by Dubey's non-performance. Macomb elected not to advance further sums to Dubey (Tr Vol XII at 28-29).

Shortly thereafter, Cle-Tex made a demand, through Macomb's treasurer, on Macomb for payment of Dubey's indebtedness to suppliers and materialmen. In order to avoid a forfeiture of the necessary sand and gravel lease, payment by Macomb was immediately authorized and made (Tr Vol XII at 26). Macomb obtained a release from Cle-Tex for all materialmen's claims (Pl Ex 20).

On July 17, 1974, when Macomb and Dubey signed the documents, but before their submission to and rejection by Cle-Tex, Dubey submitted "a whole stack" of requests for payment of his creditors to Macomb, the largest of which was Westinghouse Credit Corporation. None were paid by Macomb.

On July 26, 1974, Westinghouse Credit Corporation foreclosed on Dubey's plant and his operation was shut down. (Finas White Deposition p 83 and his notes attached). On July 29, 1974, three days after the Dubey plant was shut down and repossessed, Charles King, Macomb's Houston counsel, under direction of Jim Hicks, sent a telegram to Dubey notifying Dubey of its breach under the original contract and amendments and informing Dubey of Macomb's intention to take possession of the plant site in an attempt to mitigate its damages caused by Dubey's defaults (Tr., Vol XII at 36-37, Pl Ex 27).

This telegram also made reference to Macomb asserting rights under the July 17 documents. The problems created by Dubey's defaults under the terms of the Cle-Tex site lease and equipment lease continued even after Macomb took over the site. When Macomb attempted to set up its plant on Dubey's site, Cle-Tex charged Macomb with trespassing and refused to grant an easement for electric wiring to the plant (Tr Vol XII at 48-49). An amendment to the site lease was finally negotiated and signed by Macomb and Cle-Tex on October 1, 1974, (Pl. Ex. 14, Tr Vol XII at 49-55), two weeks after this suit was commenced. In exchange for the same concessions from Cle-Tex that were contemplated but not fulfilled by the July 17 documents Macomb obligated itself to clean up the pit by digging to full depth in the area worked by Dubey in its

unsuccessful attempt to produce specification sand (Tr Vol XII at 54-55). Macomb operated the pit thereafter in an attempt to mitigate its damages, (Tr Vol XIII at 83).

Dubey instituted this action in the Alpena County Circuit Court on September 13, 1974. Venue was changed upon motion made and granted. The twice amended complaint asked for rescission of the contract and amendments and money damages based upon the following:

> *Count I* — based upon fraud and concealment as to the conditions of the pit;
>
> *Count II* — based upon impossibility of performance;
>
> *Count III* — based upon an alleged breach of the July 17, 1974, documents by Macomb claiming a failure to advance the full contract price to Dubey; and
>
> *Count IV* — (Count IV in Sentry Complaint, Count V in Dubey Complaint*) based upon unilateral mistake.

Counts I, II and IV (V) were directed in favor of Macomb at the conclusion of the Trial, the Court having found no basis in fact to support same, as Dubey had possession of the material specifications, visited the site and consulted with his civil engineer before entering into the contract. No appeal was taken by Dubey from those issues and the matter is not now before this Court (Tr Vol XVI at 63-74).

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* Note: The Dubey Complaint had no Count IV.

As to Count III, which was amended by Dubey and Sentry before trial, Macomb moved for partial Summary Judgment when filing its answer, averring that Macomb, as a matter of law was not bound to make advances under the July 17 documents, because the documents by their express terms stated that Macomb could make discretionary advances at its option and was under no legal obligation to do so (See Exhibits 15 and 16). This motion was argued before the Circuit Court of Macomb County on February 23, 1976. The Court took the motion under advisement.

Macomb filed a Counter Complaint against both Dubey and Sentry on March 12, 1975, seeking an award of money damages for breach of contract.

Sentry moved for Partial Summary Judgment to limit its possible liability to the penal sum of the performance bonds, $543,000.00, which motion was argued by counsel on February 23, 1976, and taken under advisement by this Court. The motion was subsequently granted.

Final pre-trial was conducted by the Circuit Court on February 23, 1976, and the cause was set for trial on March 2, 1976.

Proofs were taken for four weeks. When Plaintiff Dubey rested its case, Defendant-Appellant, Macomb, moved for a Directed Verdict as to each of the counts in Appellee's Amended Complaints. The Court took the motions under advisement. At the close of Defendant's proofs, the Court dismissed Counts I, II and IV (V) of the Complaints, ruling at the same time that since Count III, which alleged a breach by Macomb of the July 17 documents, prayed for *legal* relief, in that it alleged a cause of action based on breach of contract, it would be submitted to the Jury. (Tr Vol XVI, at 63-74).

Count III alleged that the agreement between Macomb and Dubey was amended by the documents signed by Macomb and Dubey on July 17, and that Macomb had breached the contract by failing to advance all of the contract money to Dubey's creditors and for purchase of new equipment.

The Trial Court ruled that as a matter of law, Macomb was not bound by the documents by having signed them. However, that Court ruled that Macomb could be bound to the agreement expressed in the documents, if, by subsequent acts or conduct, it evidenced an intention to be bound notwithstanding the refusal of the site owner, Cle-Tex, and Sentry Insurance Co. to sign the documents (Tr., Vol XXVIII at 68; Tr. Vol XXVII at 11-12).

Dubey argued that the payment to Cle-Tex for the liens caused by Dubey, the recording of a financing statement signed by Dubey on the 17th and the telegram sent by Macomb's counsel on the 29th were acts of *ratification* of the July 17 documents by Macomb.

The cause was thus submitted to the jury. The jury was instructed that it was to consider Macomb's counterclaim for breach of contract *only* if it found no cause of action against Dubey on its Amended Complaint (Tr Vol XXVIII at 76-77).

The jury returned a verdict in favor of Dubey on its Complaint and assessed damages at $313,651.13. No cause for action against Macomb on its counterclaim was assumed by the Court (Tr Vol XXVIII at 89).

Judgment was entered on the jury verdict on April 26, 1976. On May 17, 1976, Appellant served counsel for Appellees with its Motion for Judgment Notwithstanding the Verdict or in the Alternative,

Motion for New Trial along with a Notice of Hearing and Praecipe.

These motions, among other things, argued that —

a) If there was an agreement to abide by the July 17 documents, those documents imposed no obligation upon Macomb to advance further sums to Dubey, and

b) The damages allowed were improper without a showing at trial that Dubey's profits under the July 17 documents were speculative and unprovable.

The motions were briefed and argued to the Trial Court on September 13, 1976. The Circuit Court denied Defendant's motions and an Appeal was taken to the Court of Appeals.

The matter was briefed and argued orally before the Court of Appeals. The Court of Appeals issued its opinion on March 7, 1978, affirming the Circuit Court, but holding in part:

> The July 17 agreement provided the following in regard to the agreements of Macomb:
>
> Contemporaneously herewith, Macomb has agreed to advance to Dubey certain amounts pursuant to a promissory note and security agreement of even date herewith. In addition, Macomb agrees to the extension of time of performance of the Removal Agreement as set forth in this Agreement.

> The promissory note provided in part as follows:
>
> Payee shall have the option at its discretion, but shall be under no obligation whatsoever, to make any advancement either on its own motion or pursuant to a written request by Maker (supported by such documentation as payee may request) that such an advancement be made to satisfy, in whole or part, a debt necessarily incurred in connection with Maker's production of specifification materials relating to Houston Intercontinental Airport Contract No. 101.
>
> This provision regarding advancements of money is unenforceable since it is dependent on "the will of the promissor", *Carlson* v *Johnson*, 275 Mich 35, 37; 265 NW 517 (1936). (Opinion pp 12-13).

The Opinion stated for the first time that even though Macomb could not be bound to make advances to Dubey, it was bound to extend the performance time to September 15, 1974. It alleged that Macomb breached this covenant by sending the telegram of July 29, 1974. The Court of Appeals found as a matter of fact that Dubey was on the site and attempting to produce as of that day. (Opinion of Court of Appeals pp. 8, 12 and 13).

As to the proper measure of damages, the Opinion stated correctly that this case was the type of case in which "reliance damages" could be allowed (Opinion p. 15), but failed to require the condition precedent that a showing be made that the damages are "wholly speculative and unprovable."

Appellant timely filed a Motion for Reconsideration with the Court of Appeals, claiming that a failure to extend time was not pleaded in the Complaint and was not otherwise raised throughout the entire trial. Further that even if it were pleaded, uncontroverted proofs showed that the Dubey plant was repossessed three (3) days before the Court of Appeals found a breach in sending the telegram to take back the site. Further, the Motion for Reconsideration pointed out the Court of Appeals' failure to apply the test of showing that damages were wholly speculative and unprovable in the instant case contrary to this Court's rulings.

The Motion for Reconsideration was denied on April 18, 1978.

ARGUMENT

I.

WHERE THE ONLY ALLEGED DUTY CONTAINED IN A COMPLAINT FOR CONTRACT DAMAGES IS RULED BY THE COURT OF APPEALS, AS A MATTER OF LAW, TO BE "UNENFORCEABLE", IS IT ERROR FOR THE COURT TO REFUSE TO REMAND TO CIRCUIT COURT FOR RULINGS ON MOTIONS FOR SUMMARY JUDGMENT, DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT THAT ARE CONSISTENT WITH THAT RULING?

Plaintiff-Appellees' Second Amended Complaint framed the issues of Count III that gave rise to the judgment of $313,661.56 for Plaintiff-Appellees. The

operative paragraphs of Count III are hereafter set forth in full:

"2. The Defendant repeatedly promised the Plaintiff, Earl Dubey & Sons, Inc., that it would advance said Plaintiff such further sums as necessary, up to the total contract price of $543,000.00 to enable said Plaintiff to complete performance of said contract, and the parties entered into an extension agreement for said purpose dated July 17 1974, including promissory note, security agreement, and guaranty agreement and UCC forms, all of which documentation are in the possession of the Defendant, Macomb Concrete Corporation."

3. The Defendants agreed to advance the Plaintiff certain sums, up to the contract price of $543,000.00, for the purchase of extraordinary equipment so as to enable Plaintiff to further refine the available raw materials, and thereby attempt to obtain the proper ratio of gravel materials so long as Plaintiff's proposed expenses were approved by the Defendant's consultant, Finis White.

4. Included in the agreements of the Defendant and representations made by it to the Plaintiff was the agreement to pay certain sums to Westinghouse Credit Corporation to which Plaintiff had become indebted for the purchase of equipment for use in Texas.

5. *Contrary to its agreements and representations to the Plaintiff, the Defendant did not advance sums to the Plaintiff,* which Plaintiff deemed necessary

for the acquisition of additional equipment, and it did not make payment to Westinghouse Credit Corporation, as it had agreed to do.

6. *Defendant's failure and refusal to advance the sums as promised to the Plaintiff constitutes a breach of the agreements and amended agreements* between the parties hereto of such a material and substantial extent that Plaintiff is excused from further performance thereunder, the Plaintiff is entitled to damages for Defendant's breach of contract.

WHEREFORE, ..." (emphasis added).

Paragraphs 2, 3 and 4 state that the agreement documents of July 17, 1974 imposed a duty upon Defendant-Appellant to advance sums to Plaintiff-Appellee or its creditors. Paragraph 3 was amended the week before trial (Motion for Leave to Amend dated February 26, 1976, trial commenced March 2, 1976).

Paragraph 5 alleges Defendant-Appellant breached its duty in that it did not advance sums to Dubey or make payments to Westinghouse.

Thus, the cause of action arising from this contract rests entirely upon these pleaded allegations of a duty to make advances and a breach of that duty by not making advances.

The alleged duty to make advances, if it exists, is contained in the July 17, 1974 documents.

The July 17 agreement provided the following in regard to the advances to be made by Macomb:

> Contemporaneously herewith, Macomb has agreed to advance to Dubey certain amounts

> pursuant to a promissory note and security agreement of even date herewith.
>
> The promissory note provided in pertinent part as follows:
>
> *Payee shall have the option at its discretion,* but *shall be under no obligation whatsoever,* to make any advancement either on its own motion or pursuant to a written request by Maker (supported by such documentation as payee may request) that such an advancement be made to satisfy, in whole or part, a debt necessarily incurred in connection with Maker's production of specification materials relating to Houston Intercontinental Airport Contract No. 101. (emphasis added).

Thus, the July 17, 1974 documents gave Macomb the option to make advances, but imposed no *duty* to do so.

At the Trial Court level, Defendant-Appellant filed Motions for Summary Judgment (filed October 8, 1974, argued February 23, 1976); Directed Verdict (Tr., April 1, 1976, 52); and Judgment Notwithstanding the Verdict (filed May 17, 1976, argued September 13, 1976).

Each of these Motions raised the legal infirmity of Plaintiff-Appellee's theory of a legal duty to advance further sums, based upon the clear terms of those July 17, 1974 documents, as stated above.

Following are excerpts of those motions, from the record:

A. *Motion for Summary Judgment* —

1. There is no legal duty on the part of the Defendant to perform as alleged in Count III.

2. That the legal duty of the Defendant is described in the contract labeled Exhibit A attached to the Plaintiff's Complaint and that under the terms of said Contract there is no obligation on the part of the Defendant to perform as set forth in the allegations contained in Count III.

3. That for the reasons above stated the Plaintiff has failed to state a claim upon which relief can be granted.

4. The Defendant is entitled to Summary Judgment as prescribed by Court Rule 117.2(1).

WHEREFORE, ...

B. *Motion for Directed Verdict* —

Thirdly, I would like to point out that even if the documents were binding, that no duty is imposed upon Macomb as a result of binding effect of those documents, such as would give rise to the cause of action because the documents clearly state on their face that there is no obligation on the part of Macomb whatsoever to pay any sums to Earl Dubey & Sons, Inc. There is absolutely no ambiguity in the drafting of the document. There is no showing that there is any required interpretation of that document, and there is no need to go outside that document for interpretation. It speaks for itself. (Trial Transcript April 1, 1976, p. 52).

C. *Motion for Judgment Notwithstanding the Verdict* —

This motion is made pursuant to GCR 1963, 515.2 and GCR 1963, 527.1. Defendant and Counter-Plaintiff submits that there was

presented to the Jury no triable issue of fact in support of Count III of Plaintiff's Second Amended Complaint and that Judgment on said Count should properly have been directed against Plaintiffs herein and the cause submitted to the Jury solely on Counter-Plaintiff's Complaint. (Excerpt from the Motion).

From all of the above testimony illuminating the purpose and intent of the July 17 documents, it is clear that even if Macomb evidenced an intention to be bound to the July 17 documents, the documents to which Macomb assented imposed no legal duties on Macomb. The documents themselves and the testimony relating to them clearly establish that they were intended to give Macomb the *power* and not the *duty* to advance money to Dubey. In the absence of a contractual duty imposed by the documents, the case against Macomb should not have been allowed to go to the jury. (Excerpt from Brief in Support of Motion for Judgment Notwithstanding the Verdict p. 21).

The issue was preserved before the Court of Appeals:

QUESTION #1

DOES AN AGREEMENT THAT PROVIDES FOR DISCRETIONARY ADVANCES AGAINST A CONTRACT, BUT BY ITS EXPRESS TERMS CREATES NO OBLIGATION TO DO SO, LEGALLY BIND THE DEFENDANT TO MAKE SUCH ADVANCES? (Defendant-Appellant Brief, p iii)

The Court of Appeals responded to the issue by correctly holding that the July 17, 1974 contract

documents did not impose a duty on Defendant-Appellants to make advances:

> This provision regarding advancements of money is unenforceable since it is dependent on "the will of the promisor", *Carlson* v *Johnson*, 275 Mich 34, 37; 265 NW 517 (1936) (Court of Appeals Opinion p. 13).

On the strength of this ruling, Defendant-Appellant was entitled to the relief prayed for in the Trial Court for Summary Judgment, Directed Verdict and Judgment Notwithstanding the Verdict. Defendant-Appellant raised its defense to the pleaded and tried issue of duty to make advances in the Motion for Summary Judgment that was filed with the answer to complaint.

Plaintiff-Appellees have been notified of Defendant-Appellant's position in each step of the proceedings. Neither the pleadings nor the trial raised any new matters that would obviate Defendant-Appellant's rights to the relief prayed for in each motion and now due by pronouncement of the Court of Appeals' ruling.

The Trial Court mistakenly believed that a contract could not be made to give a party discretion to proceed at its will:

> THE COURT: Let me just say for the second part of your argument, concerning judgment notwithstanding the verdict again, I'm repeating myself, but I think it was the intention of the parties at that time for Dubey to proceed with the work and for *Macomb to pay creditors while the work was progressing*. (Tr September 13, 1976 p. 32).

The Court of Appeals correctly rejected the Trial Court's interpretation of the law (Opinion p. 13). However, the Court of Appeals incorrectly went on to find that Defendant-Appellant failed to allow Plaintiff-Appellee time to perform the contract. This theory was never pleaded nor advanced at trial and therefore was not properly preserved for Appellate Review. *Magnotta* v *Michigan Millers*, 35 Mich App 450 (1971); *Goldman* v *Century Ins. Co.*, 354 Mich 528 (1958).

The decision of the Court of Appeals to affirm the trial court is clearly erroneous. The failure of this Court to review and reverse the Court of Appeals will result in Defendants-Appellant having to pay a judgment of $313,661.56 plus costs and interest on a cause of action that does not legally exist.

II.

WHERE THE ONLY ALLEGED DUTY CONTAINED IN A COMPLAINT FOR CONTRACT DAMAGES IS RULED BY THE COURT OF APPEALS, AS A MATTER OF LAW, TO BE "UNENFORCEABLE", IS IT ERROR FOR THAT COURT TO AFFIRM A TRIAL COURT JUDGMENT, BASING ITS AFFIRMANCE UPON A THEORY OF LIABILITY THAT WAS NEITHER PLEADED NOR TRIED?

The Court of Appeals correctly ruled that Defendant-Appellant had no duty to make advances to Dubey as a result of the July 17, 1974 Agreement documents (see Argument I, supra). This alleged duty to make advances was the sole theory of recovery advanced by Plaintiffs-Appellees in the pleadings and throughout the trial, all other counts of the complaint having been dismissed.

After ruling that the alleged duty to make advances was "unenforceable", the Court of Appeals sustained the trial court anyway, advancing a totally new legal theory of the case. That theory is that Defendant-Appellant breached a duty to extend the time for performance of the contract (See Court of Appeals Opinion pp 13 and 14).

In its Opinion the Court of Appeals mistakenly referred to this breach as "consideration" for the contract; but the effect of its ruling was to create a new and never-before-pleaded, or tried "duty and breach" on the part of Defendant-Appellant.

This theory of liability does not appear in the record of this case in any form whatsoever, prior to the jury rendering its verdict. The first notice ever given to Defendant-Appellant that Plaintiff-Appellees were claiming a breach of the contract in failure to extend time to Dubey was when Plaintiff-Appellees filed their Brief in Answer to Motion for Judgment Notwithstanding the Verdict.

That brief is dated August 17, 1976, and was served more than four (4) months after proofs were closed and the verdict was in.

Even this post-trial notice was not given in a way that would alert Defendant-Appellant to a new theory of liability being advanced. Rather, the statement was brief, narrow and appeared to be merely explanatory of the real issue. The total statement made in that Brief is:

> Macomb breached these contracts by reneging on its agreement to extend time for performance

> and, by declining to make advancements to creditors as promised. (Plaintiffs' Brief in Opposition to Motion for Judgment N.O.V., p 8).

A more definite reference to such a duty was made by Counsel for Dubey at the oral argument on that Motion for Judgment N.O.V. on September 13, 1976 (Tr pp 19-20), but even that was coupled with the failure of Macomb to pay further advances:

> Now that's two months to complete phase I of the contract, but we know that on July 28th or 29th, I guess it was, somewhere around there, that Dubey was forced off the site because Macomb did not live up to the contract *and did not pay these creditors* (Tr. September 13, 1976, p 20).

If the trial Judge believed that these post-trial statements raised this new theory to a triable issue, it did not say so in its ruling. The Court's remarks are contained in pages 32-35 of the Trial Transcript for September 13, 1976, and its specific holding on page 32 is as follows:

> THE COURT: Let me just say for the second part of your argument, concerning judgment notwithstanding the verdict, again, I'm repeating myself, but I think it was the intention of the parties at that time for Dubey to proceed with the work and for *Macomb to pay creditors while the work was progressing*. (emphasis added).

Before the Court of Appeals, Plaintiffs-Appellees raised this extention of time theory in full for the first time in their Brief answering Appellant's brief:

COUNTER STATEMENT OF QUESTIONS INVOLVED

II. Whether forbearance and extension of time to perform are adequate considerations to make a contract mutually binding?

In Oral Argument before the Court of Appeals, Defendant-Appellant pointed out that this issue was being raised for the first time, but the argument was apparently ignored by the Court.

As previously stated, this proposition was put to the Court of Appeals as an issue of "Consideration" for the contract rather than a "duty and breach" thereof, but the Court of Appeals in making its ruling converted it to a duty and breach (see Opinion of Court of Appeals pp 13-14).

In order to find a *breach* based upon this extention of time theory, the Court of Appeals had to find an act committed by Appellant in derogation of the duty. This the Court of Appeals apparently did from what the Court mistakenly believed to be a fact established in the record. On page 8 of the Opinion, the Court of Appeals stated the following as a fact:

> On July 29, 1974, Macomb, through its attorney in Houston, announced by telegram that Dubey was in default, that Macomb was taking possession of the production site and that demand was being made for payment by Dubey of the promissory note and personal guarantee of July 17, 1974. Dubey's plant was closed and the relationship between Dubey and Macomb was ended.

This statement, in the Opinion contains the only *action* claimed to be a breach of extention of time and is uncontrovertably *untrue*. Wayne Dubey's testimony showed that his plant was repossessed about a week after the July 17 documents. Finas White testified, and his written log (notes) attached to his deposition establish, that the plant was repossessed on July 26, 1974.

When the Court of Appeals reasoned that Defendant-Appellant had a duty to extend the performance time of Dubey to September 15, 1974, it ignored the fact that Dubey *could not perform*. At trial, Dubey's counsel emphasized that point in his final argument to the jury:

> Now, the agreements were signed by Howard Martin, then the project superintendent for Macomb Contracting and Wayne Dubey. They were signed in Mr. King's office on the 26th (sic 17th) day of July. Nine days later, Westinghouse Corporation foreclosed on the plant owned and operated by Earl Dubey & Sons, *and that brought an end to his ability to perform production of sand and gravel, no question about that*. The reason Westinghouse foreclosed is obvious to all of us, they didn't get paid. (Transcript April 2, 1976, p. 25) (emphasis supplied).

As the above quote clearly shows, Dubey's plant was closed and his "ability to perform production of sand and gravel" was "brought to an end" three days before the telegram was sent. It was ended for the reason that Westinghouse Credit Corporation did not get paid and not because of any *action* or *act* of Defendant-Appellant.

The law of Michigan is clear that where one party to a contract puts its performance out of his power, the other party has an immediate right of action, *Sheahan* v *Barry*, 27 Mich 217, 223 (1873); *Adams* v *E. M. Burke Homes, Inc*, 14 Mich App 578, 590 (1968) (concurring opinion of Judge Levin); see also, 17 Am Jur 2d Contracts §453.

Fortunately, these facts appear on the record even though there was no conscious effort on the part of Defendant-Appellant to make the record. While these facts are now helpful to Appellant, they by no means comprise the record that would have been made, had this been an issue at trial.

Without pleadings creating an issue of this point, Defendant-Appellant had no reason to build such a record. Indeed, offers of proof on this point, outside the scope of the pleadings, would have been properly rejected by the Trial Court as "irrelevant" in a four (4) week trial.

Had the issue of an alleged breach of duty to extend time been raised by pleadings or even at trial, instead of for the first time on appeal, Appellants could have alleged and proven that the repossession by Westinghouse Credit Corporation, as a matter of law, excused Appellant from further forbearance. More importantly, Defendant-Appellant could have produced positive evidence that it committed no act to interfere with Dubey's operation prior to the plant being repossessed and the inability to perform occurring.

Our entire system of pleading is based upon a concept of openness with full opportunity afforded to all parties to meet the opposition in a state of preparedness at trial.

A complaint must allege facts sufficient to reasonably apprise the Defendant of the nature of the cause it is called upon to defend. GCR 1963, 111.1 *McLaughlin* v *Consumers Power Co.*, 52 Mich App. 663 (1974). *Lockaby* v *Wayne County*, 63 Mich App 185, 190 (1975).

The allegations in the Second Amended Complaints in this case never apprised Defendant-Appellant that it breached the July 17, 1974 agreement by not allowing Dubey enough time in which to complete the contract. The entire theory of the case, as most fully explained in final argument to the jury (Tr. Vol XVII), makes no reference to this theory of recovery whatsoever.

Under these circumstances, Defendant-Appellant had no opportunity to discover on this theory prior to trial, was unprepared to meet any evidence that may now inadvertantly appear on the record; and, consciously introduced no evidence in its own defense. Even though a valid defense existed (Dubey was physically, unable to proceed beyond the date its plant was repossessed) Defendant-Appellant had no opportunity to plead that defense or develop it at trial.

In short, Defendant-Appellant was totally prejudiced on the issue of whether it breached the July 17, 1974 documents by failing to extend time to Dubey to perform the contract.

Breach of a duty to extend time as the alleged breach of contract was never raised at the trial of this cause in any manner so as to effect an amendment of the pleadings to conform to the evidence pursuant to GCR 1963, 118.3.

This insertion of the new theory in the Court of Appeals Opinion without having been raised at the trial

introduces a new dimension to our system of jurisprudence that is a matter of major significance to the system and is in conflict with other decisions of the Court of Appeals. *Security Ins Co of Hartford* v *Daniels*, 70 Mich App 100 (1976); *Ptasznik* v *Johnston*, 63 Mich App 410 (1975); *Furstenberg Brothers* v *Carrollton Twp*, 61 Mich App 230 (1975).

The prejudice to Defendant-Appellant in now having a judgment against it without notice and an opportunity to meet the issue in any meaningful hearing is clearly offensive to Defendant-Appellant's rights to due process as guaranteed by the 14th Amendment to the United States Constitution and Article I, Sec 17 of the Michigan Constitution.

III.

WHEN, IN A SUIT FOR BREACH OF CONTRACT, PLAINTIFF HAS FAILED TO SHOW THAT HIS PROFITS ARE TOTALLY SPECULATIVE, CAN THE PROPER MEASURE OF DAMAGES BE THE TOTAL OF PLAINTIFF'S EXPENDITURES INCURRED WHILE PLAINTIFF IS IN BREACH?

This argument requires an assumption that Defendant-Appellant breached a contract in a way that prevented Dubey from completing performance of that contract. Without conceding this point Appellant makes that assumption.

Appellant contends the Court of Appeals erred in failing to require a showing at trial of the condition precedent that Dubey's profits were wholly speculative and unprovable before determining that it was appropriate to allow *actual* expenses as the measure of damages.

At the conclusion of Plaintiffs-Appellees' proofs, Defendant-Appellant moved for Directed Verdict, based in part upon there being no showing of lost profits as the proper measure of damages, and no showing that profits as a measure of damages would be wholly speculative and unprovable.

The sole evidence in the trial record of Dubey's damages was Plaintiffs' Exhibit 37, and Wayne Dubey's testimony explaining what Exhibit 37 was.

The exhibit and the testimony explaining it clearly shows that Dubey's only evidence as to the damages resulting from breach of these contract documents is an itemization of all expenses incurred by Dubey while admittedly in breach of the first contract and its amendments, and not while in furtherance of the July 17, 1974 documents (See Tr. Vol II, p. 87 and Tr. Vol V, pp 397-399).

The testimony of Wayne Dubey openly admitted that he refused to expend any sums in reliance on the July 17 documents. (Tr. Vol II, p. 81).

Jim Hicks, Vice-President of Defendant-Appellant, also testified that Dubey had not attempted to continue performance after July 17. (Tr. Vol XII, p. 30).

The law of Michigan pertaining to the measure of damages in breach of contract actions as stated in 7 Callaghan's Michigan Civil Jurisprudence, Damages, §§52 et seq. is:

> Damages for breach of contract should be adequate to compensate for the real injury sustained and, as far as money can do so, should place the plaintiff in the same position he would

have occupied had the contract been fulfilled, at the least cost to the Defendant and without charging him for damages he could not reasonably foresee at the time of making the contract. . . *The terms of the contract itself, entered into by the parties, determines the damages flowing from the breach, it being necessary to ascertain what the promised performance would have been but for the breach in order to determine the compensation which will put the injured party in as good a position as if performance had been rendered.* The underlying rule of the law of damages, where there is a breach of contract, is compensation and generally, the plaintiffs in a breach of contract action are entitled only to just compensation for the loss actually sustained. . .

Reliance interest for which recovery may be obtained in a breach of contract action is that interest of the nondefaulting party in expenditure which he made or property which he transferred or consumed in reliance on the contract. But one of the necessary elements for recovery of damages grounded on reliance on a contract is lack of knowledge by the promisee of breach of the contract by the promisor. (footnotes deleted, emphasis added).

The proper measure of damage where the breach of one party prevents the non-breacher from completing the contract is the contract price, less the cost of completion. In other words, the non-breacher is entitled to his *profit* of the job. *Kolton* v *Nassar*, 358 Mich 154 (1959); *Scheible* v *Klein*, 89 Mich 376 (1891); *Rayburn* v *Comstock*, 80 Mich 448 (1890); *Goodrich* v *Hubbard*, 51 Mich 62 (1883); *Grand Rapids & B. C. R. Co* v *Van Quesen*, 29 Mich 431 (1874). See also 17 ALR2d 968-993.

This is the rule of law by which litigants and the trial courts are regulated in order that the activity of juries may be controlled to some degree.

There are, in this class of cases where performance is prevented by a breaching party, certain situations wherein an exception to this rule is allowed and his actual expenditures in trying to perform are allowed as his damages. A situation pertinent to the case at hand, is the case in which the injured party shows that his profit is not provable and is wholly speculative. *Tross* v *HEG Clarke Co*, 274 Mich 263, 265-266 (1936). However, the burden is upon the Plaintiff in these cases to come forward with evidence to establish his right to this exception status. This rule was made clear in the early case of *Maltby* v *Plummer*, 71 Mich 578, 588 (1888), wherein the court held that the testimony given on lost profits *was presented* "in a most speculative way". Based upon that showing, the court would not allow damages upon the profits evidence, but did allow instead, damages for wages paid employees while performing on the contract.

The *Tross* case, *supra*, sets forth the current language controlling the rule:

> Generally speaking, the measure of damages would be loss of profits to plaintiff from the prevention of performance. But where the profits are wholly speculative and unprovable, the one who prevents performance may not go scot-free.
>
> "Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures." *United States* v *Behan*, 110 U.S. 338, 344 (4 Sup. Ct. 81.) *Tross* v *HEG Clarke Co*, 274 Mich 263, 265-266 (1936).

Clearly, under this rule, actual expenditures are not allowed unless "profits are wholly speculative and unprovable".

Dubey made no attempt to prove lost profits and gave no explanation for the failure to do so.

Defendant-Appellant contends Dubeys profits were provable, and from the record can show that all the ingredients required to prove them were factually at Dubey's disposal during the trial. No opportunity to rebut such a showing was given to Defendant-Appellant, however and only a return to the Trial Court would fairly test the issue.

An interesting question on this exception is raised by this case. If Dubey had been permitted to complete the contract but would have lost money (as Appellant contends he most assuredly would have), what then would his measure of damages be? Is he entitled to a windfall, rather than being made whole? The proper measure of damages should be the difference between his actual expenditures less the loss he would have sustained. Assuming Dubey would have lost on the contract if fully produced, then rather than recovering all his expenditures, shouldn't he be left with that loss that he would have sustained? Imposing the loss Dubey would have sustained upon Macomb goes beyond compensating Dubey and punishes Macomb, which is beyond the interest of the law in providing for the award of damages.

Clearly, it was error for the Trial Court to allow the jury to award the actual expenditures of Dubey in his failure with the original contract and first two amendments, without requiring a showing that Dubey could not comply with the proper rule of damages, as required by *Tross, supra*.

SUMMARY AND RELIEF

Succinctly stated, the issues contained herein provide the compelling reasons why this case is worthy of review. The threshold question must be answered:

> Is it fair under our system of jurisprudence to allow an appellate court to affirm a judgment now worth over one-third (1/3) of a million dollars based upon a theory of recovery never pleaded or tried; upon a theory that is based upon erroneous facts; and upon a theory which cannot stand the test of close judicial scrutiny?

This is not simply a breach of contract case. It is an action in which a four-week trial was conducted to determine whether the *pleaded* breach had occurred. At no time prior to appeal was the theory which was espoused by the Court of Appeals a part of this case. It is manifestly clear that the status of this case as it exists today has resulted in great prejudice to Defendant-Appellant. This Court now holds the only key to unlock the door of justice.

Defendant-Appellant prays that this Honorable Court grant its Application for leave to appeal.

Respectfully submitted,

ROBERT P. DANK, P.C.

/s/ Robert P. Dank

Date: May , 1978

APPENDIX XIII

ORDER DENYING APPLICATION FOR LEAVE TO APPEAL

(State of Michigan
In the Supreme Court)

(Filed)

(Earl Dubey & Sons, Inc., a Michigan corporation, and Sentry Insurance Company, a mutual company, Plaintiffs-Counter Defendants-Appellees, v Macomb Contracting Corporation, a Michigan corporation, Defendant-Counter Plaintiff-Appellant. No. 61401)

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 5th day of July in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable Thomas Giles Kavanagh, Chief Justice, G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because the Court is not persuaded that th questions presented should be reviewed by this Court.

(Certificate omitted in printing.)

APPENDIX XIV

MOTION FOR RE-HEARING

(State of Michigan
In the Supreme Court)

NOW COMES MACOMB CONCRETE CORPORATION, Appellant, and moves this Honorable Court to grant its Motion for Rehearing of this Court's Order denying Appellant's Application for Leave to Appeal. In support of this Motion, Appellant states:

1. Appellant made Application for leave to Appeal in this Court on May 4, 1978.
2. On July 5, 1978, this Court denied Application for Leave to Appeal.
3. The denial of Appellant's Application lets stand a judgment which is clearly violative of Appellant's right to due process of law in the Courts of this State. This right is guaranteed by the 14th Amendment to the United States Constitution and by Article I, Section 17 of the Michigan Constitution of 1963.
4. The denial of Appellant's Application lets stand a judgment which is clearly contrary to well-established decisions of the United States Supreme Court and the Supreme Court of the State of Michigan without explanation.

This motion is brought pursuant to GCR 1963, 864.4 and 862 and is supported by the Brief attached hereto.

ROBERT P. DANK, P.C.
Attorneys for Appellant

By: Robert P. Dank
14 First Street
Mount Clemens, MI 48043
469-4100

Date: July 13, 1978

BRIEF IN SUPPORT OF MOTION FOR RE-HEARING

(State of Michigan
In the Supreme Court)

* * *

STATEMENT OF QUESTION PRESENTED

WHERE THE ONLY ALLEGED DUTY CONTAINED IN A COMPLAINT FOR CONTRACT DAMAGES IS RULED BY THE COURT OF APPEALS TO BE "UNENFORCEABLE", IS IT A DENIAL OF DUE PROCESS OF LAW FOR THAT COURT TO AFFIRM THE TRIAL COURT JUDGMENT, BASING ITS AFFIRMANCE UPON A THEORY OF LIABILITY THAT WAS NEITHER PLEADED NOR TRIED?

The Court has not answered this question.

Appellant contends the answer should be "Yes".

STATEMENT OF FACTS

Appellant respectfully calls the Court's attention to the Statement of Facts in Appellant's Brief in Support of Application for Leave to Appeal (pp 1-9) and Appellant's Reply Brief (pp 1-2).

Said Application was denied by this Court on July 5, 1978 for the reason that the Court was not persuaded that the questions presented should be reviewed by this Court.

ARGUMENT

THE COURT OF APPEALS DENIED APPELLANT DUE PROCESS OF LAW IN THAT APPELLANT WAS NOT AFFORDED NOTICE OF OR AN OPPORTUNITY TO DEFEND AGAINST THE NEW LEGAL THEORY OF RECOVERY UPON WHICH THE JUDGMENT IS NOW BASED.

As argued in Appellant's Brief in Support of Application for Leave to Appeal (Brief at 18), the Judgment entered in this case is clearly constitutionally defective.

The judgment entered upon the jury verdict was founded upon the erroneous supposition by the trial court that the Appellees' pleadings and theory of the case contained a legal duty on the part of Appellant to advance monies under the contract.

That error by the Trial Court was corrected by the Court of Appeals which held that the contract language itself negated any legal duty, as pleaded, proved, theorized by Appellees and argued to the Jury.

The judgment that now stands against Appellant does not relate to the pleadings, or the theory of the case advanced by Appellees at trial. This judgment rests upon a theory (duty to forbear) which was *never* pleaded or raised before the jury verdict was rendered.

This judgment, and the refusal of the Court of Appeals and of this Court to correct this startling miscarriage of justice is a patent and inexplicable denial of Appellant's right to due process of law as guaranteed by the 14th Amendment to the United States Constitution and by Article 1, Section 17 of the Michigan Constitution of 1963.

Due process guarantees place limits upon judicial actions, so that judgments may not be rendered in violation of these constitutional limitations and guarantees, *Hanson* v *Denckla*, 357 US 235; 78 S Ct 10; 2 L Ed 2d 1283 (1958). This due process limitation on the judiciary is of paramount magnitude in our constitutional form of government, given the Courts' role as interpreter and protector of constitutional rights.

The proposition that a Court cannot, consistent with due process, grant or uphold a judgment not based on the pleadings and proofs is beyond question. The earliest pronouncement of this fundamental principle can be found in the opinion of Justice Marshall in the case of *The Schooner Hoppet and Cargo* v *The United States*, 11 US (7 Cranch) 389; 3 L Ed 380 (1813) at pages 394-395:

> It is therefore a maxim of the Civil Law that a decree must be *secundum alegata* as well as *secundum probata*. It would seem to be a maxim essential to the due administration of justice in all courts.

In *Reynolds* v *Stockton*, 140 US 254; 11 S Ct 773; 35 L Ed 464 (1890), the Court addressed itself to a judgment entered by a Court in manner identical to the instant case (not taken from the issue of the case). The Court there held:

> The invalidity of the judgment depends upon the fact that it is in no manner responsive to the issues tendered by the pleadings. This idea underlies all litigation. Its emphatic language is, that a judgment, to be conclusive upon the parties to the litigation, must be responsive to the matters controverted. 35 L Ed at 468.

* * * *

> But without multiplying authorities, the proposition suggested by those referred to, and which we affirm is, that in order to give a judgment, rendered by even a court of general jurisdiction, the merit and finality of an adjudication between the parties, it must, with the limitations heretofore stated, be responsive to the issues tendered by the pleadings. 35 L Ed at 469.

This proposition was again firmly applied in *United Transportation Union* v *State Bar of Michigan*, 401 US 576; 91 S Ct 1076; 28 L Ed 2d 339 (1971). The U. S. Supreme Court there held:

> A decree must relate specifically and exclusively to the pleadings and proofs. If not so related, the provision, because of its vagueness, will jeopardize the exercise of protected freedoms. 401 US at 581.

Likewise, the U.S. Courts of Appeals have consistently held that a judgment that goes beyond the pleadings and proofs is clearly violative of due process guarantees. For example, in *Armstrong Cork Co* v *Lyons*, 366 F2d 206 (CA 8, 1966), a fact situation comparable to the facts at hand was discussed as follows:

> The issue which the District Court seemed to think accrued was certainly not voluntarily litigated by Armstrong, which had not been put on notice of any other issues save the combination and conspiracy alleged in the complaint. The principal governing the prohibition of placing Armstrong in such an unfair position is well stated by the late Judge

Sanborn in *Sylvan Beach* v *Koch*, 140 F2d 852, 861-862 (8th Cir. 1944):

> "A court may not, without the consent of all persons affected, enter a judgment which goes beyond the claim asserted in the pleadings. (Citing cases). Unless all parties in interest are in court and have voluntarily litigated some issue not within the pleadings, the Court can consider only the issues made by the pleadings, and the judgment may not extend beyond such issues nor beyond the scope of the relief demanded. *A party is no more entitled to recover upon a claim not pleaded than he is to recover upon a claim pleaded but not proved.*
>
> *"The foregoing rules are all fundamental and state nothing more than the essentials of due process and of fair play*. They assure to every person his day in court before judgment is pronounced against him"
>
> * * * *
>
> *It is settled law that a plaintiff cannot bring his action and try his case on one theory and recover on another*. 366 F2d at 208, 209. (emphasis added).

See also, *Albrecht* v *Herald Co*, 367 F2d 517, 525-526 (CA 8, 1966); *Atlas Chemical Industries, Inc* v *Moraine Products*, 509 F2d 1, 7 (CA 6, 1974); *U S* v *Miller Brothers Construction Co*, 505 F2d 1031, 1035 (CA 10, 1974).

The Michigan Courts, paying homage to the rule, have held with numerous decisions that pleadings must

contain sufficient information to allow the opposing party an opportunity to fairly meet the issue:

> Plaintiff must allege and prove its theory of the case, the claimed negligent acts of defendants and the manner in which it claims that the accident occurred. The jury may not return a verdict for plaintiff on some different theory than that advanced by plaintiff. Otherwise the purpose of requiring a plaintiff to plead the facts on which he relies (Michigan Court Rule No. 17 [1945]) and set forth in his declaration such specific allegations as will reasonably inform the defendant of the nature of the cause he is called upon to defend (Michigan Court Rule No. 19 [1945]) and to support them with competent evidence is completely subverted and litigation reduced to a game of chance. *Hormel Estate* v *Harris*, 348 Mich 201, 205 (1957).

This principle, as announced in *Hormel, supra*, has likewise been consistently followed by this Court and the Michigan Court of Appeals. For example, in *Scott* v *Cleveland*, 360 Mich 322 (1960), this Court held that the granting of leave to file an amended complaint on the day of trial was reversible error because the Defendant was deprived the opportunity to prepare a defense. The Court held:

> We believe that the variance between the plaintiff's theory originally pleaded and his theory as amended at the trial was more than a question of evidence for the jury's determination. The amendment allowed completely changed the plaintiffs' theory of the case without providing the defendants with an opportunity to prepare a defense thereto. *Scott* v *Cleveland*, 360 Mich 322, 335 (1960).

The Michigan Court of Appeals has likewise held that judgments must be based on pleadings and proofs so that parties will have a meaningful opportunity to prepare and present a defense. For example, in *Hall* v *Iosco County Road Commission*, 2 Mich App 511 (1966), the Court held:

> The issue of decedent's intoxication was not raised by defendant's pleadings and hence, the admission of evidence to establish it is prejudicial error. *Scott* v *Cleveland* (1960), 360 Mich 322, at page 330:
>
> > "This court has frequently considered the proper role of pleadings in today's practice, particularly in the light of present pretrial conference procedures. In *Manley, Bennett & Co* v *Woodhams*, 349 Mich 586, the Court said, at p 592: 'The essential requirement of pleading came to be recognized as nothing more complicated than giving the other party reasonable notice of the claim or defense. As Sunderland [14 Mich L Rev 551, 553] puts it, "The purpose of pleading has ceased to be the exemplification of the subtleties of pleader's logic and has become the intelligible disclosure of the real nature of the respective claims of the parties." ' "

The fashioning of a new legal theory to sustain the judgment entered in this case after the rendition of the jury verdict unquestionably deprived Appellant of the rudiments of due process guarantees; i.e. notice of the claim upon which it was called upon to defend and a

meaningful hearing where it could present its defenses to the alleged claims.

Violence has been done to the due process touchstone of basic fair play in this case by the Courts of this State. In a four week trial, Appellant had no opportunity to prepare a defense, to confront, to cross-examine or to defend against the issue forming the basis of the judgment now standing against it.

Execution upon this enormous judgment is now under way in what is clearly a deprivation of property, under the law, without due process.

The Trial Court erred in its misunderstanding of the law.

The Court of Appeals erred in going outside the pleadings and Appellees' theory of the case to find a new basis for liability.

This Court will surely err if it fails to grant leave to appeal and to provide Appellant with the minimal due process rights guaranteed to all litigants in the Courts of this State.

RELIEF

Appellant, MACOMB CONCRETE CORPORATION, prays that this Honorable Court grant its Motion for Re-Hearing and, upon re-hearing and reconsideration, grant its Application for Leave to Appeal.

Respectfully submitted,

ROBERT P. DANK, P.C.

Robert P. Dank

Date: July 13, 1978

APPENDIX XV

ORDER DENYING MOTION FOR REHEARING

(State of Michigan
In the Supreme Court)
(Filed)

(Earl Dubey & Sons, Inc., a Michigan corporation, and Sentry Insurance Company, a mutual company, Plaintiffs-Counter Defendants-Appellees, v Macomb Contracting Corporation, a Michigan corporation, Defendant-Counter Plaintiff-Appellant. — No. 61401)

At A Session Of The Supreme Court Of The State Of Michigan, Held at the Supreme Court Room in the City of Lansing, on the 7th day of December in the year of our Lord one thousand nine hundred and seventy-eight.

Present the Honorable Thomas Giles Kavanagh, Chief Justice. G. Mennen Williams, Charles L. Levin, Mary S. Coleman, John W. Fitzgerald, James L. Ryan, Blair Moody, Jr., Associate Justices.

On order of the Court, the motion for rehearing, motion for stay of proceedings and motion for immediate consideration are considered. The motion for immediate consideration is DENIED. The motion for rehearing is DENIED because GCR 1963, 864.4, provides for the filing of such motions only in opinion cases. Defendant-appellant's motion is treated as a motion for reconsideration of this Court's order of July 5, 1978, and the motion is DENIED, because it does not appear to the Court that said order was entered erroneously. The motion for stay of proceedings is DENIED as moot.

(Certificate omitted in printing.)